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(Reports)

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*D. G. Palekar and A. Alagiriswami, JJ.*

Narasareddy and others.. *Appellants**

v.

Sughra Begum and others.. *Respondents.*

Deed—Admissibility of—Plaintiff's witness not cross-examined—No positive denial in written statement—Thumb-impression at the beginning of the document if makes the document suspicious.

The question was whether Exhibit P-8 in the instant case was a genuine document or not. It was in English and referred to the amount advanced by the 11th defendant towards the purchase of the land as a loan. Though in the written statement filed by the 11th defendant the verbal agreement as well as Exhibit P-8 were formally denied, there was no positive denial. The document was signed not only by the 11th defendant but also by her husband, D.W. 15 as a witness. The trial Court thought that the fact that the thumb-impression was found at the beginning of the document was suspicious. The High Court, however, stated that such is the usual practice in the Telangana region. There is no reason why due importance to this observation should not be given. The view is also supported by the fact that Exhibit D-1 bears the thumb-impressions of both the plaintiff and the 11th defendant in the beginning. In the circumstances if the defendants wanted to impugn the genuineness of Exhibit P-8 it was open to them to have insisted that Exhibit P-8 should be sent to the finger-print expert for finding out if the thumb-impression on it was that of the 11th defendant. This was not done. Nor did D.W. 15 have the courage to demand that his signature should be sent to the hand-writing expert. Though P. Ws. 2-4 and P.W. 7 spoke about the execution of Exhibit P-8 by 11th defendant, there was no cross-examination worth speaking on this point. In the circumstances, it has to be held that the High Court was right in coming to the conclusion that Exhibit P-8 was a genuine document. [*Para.* 2.]

The Judgment of the Court was delivered by

Alagiriswami, J.—The plaintiff and the 11th defendant purchased under the sale deed (Exhibit P-3) dated 5th June, 1941 about 200 acres of land in Jagdeopur village in Siddipet taluq of Medak District and about 450 acres of land in Gandamalla in Bhongir taluq of Nalgonda District for a sum of Rs. 5,000. According to the plaintiff she borrowed Rs. 3,000 from the 11th defendant to enable her to make the purchase and the name of the 11th defendant was included in the sale deed in order to provide security for the amount so advanced by the 11th defendant. There was an oral agreement to that effect prior to the sale and this was reduced to writing under Exhibit P-8. The amount

* C.A. No. 2491 of 1968. *27th July, 1973.*

due to the 11th defendant was repaid in 1944 and she was entitled to all the lands. Defendants 1-10 dispossessed the plaintiff of the suit lands during the disturbances preceding the Police action in the old Hyderabad State in 1948. The defendants contended that the sale deed represented the true state of facts and the 11th defendant was entitled to half of the property and that the plaintiff and the 11th defendant entered into an oral agreement with D-1 and D-7, as a result of which defendants 1-10 were taken as tenants from 1945 till 1948, that they later became vendees and that they were protected tenants under the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950. The 11th defendant supported the defendants 1-10 in their contentions. The trial Court held that the 11th defendant was entitled to half of the lands, that the verbal agreement pleaded by the plaintiff was not proved, that there was no satisfactory evidence regarding the execution of Exhibit P-8, and that the repayment of the loan by the plaintiff was not proved. It, however, held in respect of the Jagdeopur land that the plaintiff alone was in possession of the suit lands till 1948. It further held that the oral lease set up by defendants 1-10 was not true and that they occupied the lands illegally. With regard to lands in Gandamalla village it held that the defendant 1 is a protected tenant and the civil Court is debarred from going into the validity of the tenancy certificate, and the plaintiff cannot evict him with regard to 277 acres and 20 guntas. The High Court on appeal after an exhaustive appraisal of the evidence held that the plaintiff's contention regarding the interest of the 11th defendant in the sale deed was true, that Exhibit P-8 is a genuine document and that the repayment of loan was true. It agreed with the trial Court that plaintiff alone was in actual possession of the Jagdeopur lands, that the oral lease set up by defendants 1-10 was not true and that they occupied the lands illegally. It differed from the trial Court and held that D-1 and others were not protected tenants in respect of the lands in Gandamalla village, that Exhibit D-40, the tenancy certificate, on the basis of which the 1st defendant was held to be a protected tenant by the trial Court was brought into existence to support the defendant's case, and therefore, allowed the plaintiff's suit *in toto*. The defendants have filed this appeal by certificate granted by the High Court. We find ourselves in entire agreement with the learned Judges of the High Court. It is not necessary to deal with two other items of property which was dealt with by the Court below.

2. The whole case turns upon the question whether Exhibit P-8 is a genuine document or not. If it is held to be a genuine document the question whether the plaintiff repaid the loan taken by her from the 11th defendant is of no importance. It is difficult to understand the written statement filed on behalf of the 11th defendant on this aspect of the case. It is in English and refers to the amount advanced by the 11th defendant towards the purchase of the land as a loan though contrary to the plaintiff's contention it is contended that the whole of the Rs. 5,000 was given by the 11th defendant. If it is a loan, whether it is of Rs. 5,000 or Rs. 3,000 makes no difference. Though in the written statement the verbal agreement as well as the Exhibit P-8 are formally denied, there is no positive denial. This document is signed not only by the 11th defendant but also by her husband, D.W. 15 as a witness. It bears the 11th defendant's thumb-impression. The trial Court thought that the fact that the thumb-impression was found at the beginning of the document was suspicious. The learned Judges of the High Court have, however, stated that

such is the usual practice in the Telangana region. We cannot but give due importance to this observation of the learned Judges. Their view is also supported by the fact that Exhibit D-1, the General Power of Attorney, said to have been executed by the plaintiff and the 11th defendant bears the thumb-impressions of both of them in the beginning. In the circumstances if the defendants wanted to impugn the genuineness of Exhibit P-8 it was open to them to have insisted that Exhibit P-8 should be sent to the finger-print expert for finding out if the thumb-impression on it is that of the 11th defendant. This was not done. Nor did D.W. 15 have the courage to demand that his signature should be sent to the hand-writing expert. And it has to be pointed out that though P.Ws. 2-4 and P.W. 7 spoke about the execution of Exhibit P-8 by defendant 11, there was no cross-examination worth speaking on this point. P.W. 3 on seeing Exhibit P-8 identified the signature of D-11's husband, and stated that this was the document which was executed by the 11th defendant. He was not cross-examined at all. P.W. 3 is a stranger to the family. There was no cross-examination of this witness worth speaking of. P.W. 4 identified the signature of D.W. 15 and the other attesting witness and also the thumb-impression of the 11th defendant. Although the 11th defendant's pleader wanted to cross-examine him, he did not actually do so. P.W. 7 is none other than the 11th defendant's son-in-law. He was also not cross-examined on the point. In the circumstances we are satisfied that the High Court was right in coming to the conclusion that Exhibit P-8 is a genuine document. The most significant fact to our mind is that in spite of the definite assertion on behalf of the plaintiff that the 11th defendant executed Exhibit P-8, she did not categorically deny this nor did she enter the witness box and deny it. We do not think that Exhibit D-1 in any way militates against this conclusion. The High Court has pointed out that though the plaintiff is the signatory, the document only had her thumb-impression and that it was executed at a time when plaintiff's husband was admittedly in jail, and that the internal evidence also shows that this document is the result of a sinister attempt by D.W. 15 to establish the rights of his wife to a half share in the lands.

3. We think it hardly necessary to refer at length to the conclusions arrived at by the trial Court as well as the Appellate Court that the 11th defendant was not in possession of the suit lands but that only the plaintiff was in possession throughout. We agree with their concurrent finding on this point.

4. As regards the lands in Gandamalla village, in view of the other findings already given above, the defendants' case rests only upon Exhibit D-40. The question of its genuineness was not seriously argued. The High Court has pointed out that interpolations and corrections have been made in Exhibit D-38, the Permanent Register, for obtaining Exhibit D-40. It has elaborately discussed the question of genuineness of Exhibit D-38 and Exhibit D-40 and come to the conclusion that they have been brought into existence to support the case of the defendants. The learned District Judge was of the opinion that right or wrong since Exhibit D-40 had been obtained, no civil Court could question it. We agree with the High Court that when once Exhibit D-40 is held to be not a genuine document at all there is no question of any rights that could be claimed on the basis of that document; nor could the jurisdiction of the civil Court be shut out on the basis of a spurious document. We have dealt with the only two points argued.

5. As a result we uphold the judgment of the High Court and dismiss this appeal.

The appellants should pay the respondents' costs.

V.M.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*P. Jaganmohan Reddy, S. N. Dwivedi and P.K. Goswami, JJ.*

Workmen .. *Appellants**

v.

Management of Sijua (Jherriah) Electric Supply Co., Ltd. .. *Respondents.*

(A) *Electricty (Supply) Act (LIV of* 1948), *Sixth Schedule, Para. II (i)—Interpretation —Amount payable as consumer's rebate, if to be deducted before profits could be computed.*

A perusal of Paragraph II (i) of the Sixth Schedule to the Electricity (Supply) Act would show that the portion that is set apart as a rebate to the consumers has not been described as a reserve in the same manner as the other portions have been described, for the simple reason, that the amount has to be returned to the consumers in the form of rebate. If rebate is given to the consumers in respect of the electricity consumed by them and for which payment has already been made, it is apparent that the price of electricity which the consumers will in fact pay, after receiving the rebate, would be the actual price paid by them for electricity consumed. Therefore there is no doubt that the amount payable as consumer's rebate under the Act has to be deducted before profits could be computed. [*Para.* 9.]

(B) *Payment of Bonus Act (XXI of* 1965), *Item* 6 *to Schedule III—"That accounting Year" meaning of—Unappropriated development reserve for the earlier years, if could be appropriated in the year of account— Electricity Supply Act, Schedule VI, Para. V-A* (1) *and* (2).

The words "that accounting year" occurring in Item 6, Schedule III of the Payment of Bonus Act refer to the year of account in respect of which appropriation to the reserve and the deduction under the Bonus Act is being considered. A reference to sub-paragraphs (1) and (2) of paragraph V-A of the Sixth Schedule to the Electricity (Supply) Act does not justify the conclusion that the sums which could have been appropriated for the years 1961-62, 1962-63 and 1963-64 were the amounts required to be appropriated in the accounting year 1964-65. Paragraph VI deals only with appropriation to a development reserve for the year of account, which in this case would be 1964-65. [*Paras.* 11, 12.]

Cases referred to :—

Poona Electric Supply Co. Ltd. v. *Commissioner of Income-tax, Bombay,* A.I.R. 1966 S.C. 30: (1965) 3 S.C.R. 818: (1965) 2 S.C.J. 343: (1965) 2 I.T.J. 234 : 57 I.T.R. 521; *Jabalpur Bijlighar Karmachari Panchayat* v. *Jabalpur Electric Supply Co. Ltd.*, A.I.R. 1972 S.C. 70 : (1972) 1 S.C.R. 60.

The Judgment of the Court was delivered by

Jaganmohan Reddy, J.—The Management of Sijua (Jherriah) Electric Supply Company Ltd.—the respondents—had initially offered only 4 per cent. bonus to all the employees of its establishment because the allocable surplus which was available was less than 4 per cent. Subsequently, having regard to the decision of the Madras High Court it revised the calculations of allocable surplus and offered to

*C.A. Nos. 2446 and 2447 of 1967.
25th September, 1973.

distribute to its employees under the Payment of Bonus Act, 1965 (hereinafter termed 'the Bonus Act') a sum of Rs. 34,492. The workmen (appellants) refused to accept this amount as the management had failed to furnish the details or the basis of computing the amount which was being offered to them. A dispute was thus raised, and it was referred to conciliation. It appears that during these conciliation proceedings, both the parties agreed to the following terms of settlement :

> "(1) The Union agree to accept the present offer of the management purely on provisional basis without prejudice to their claim for higher bonus for the year 1964-65. The management agree to distribute this amount as early as possible.
>
> (2) Both the parties agree to refer to the Industrial Tribunal for adjudication the following points of difference in respect of calculation of available surplus for the year 1964-65 to settle the issue of payment of bonus for that year.
>
> (*a*) Whether a sum of Rs. 18,086 provided for in the profit and loss account as provision for rebate to consumers in accordane with the 6th Schedule of the Electricity Supply Act, 1948 should be added back to arrive at the gross profit for the said accounting year in accordance with the Payment of Bonus Act ? If so, whether this amount should also be deducted from the gross profit to arrive at available surplus?
>
> (*b*) Whether deduction of the following amounts from the gross profit is in accordance with the provisions of the Payment of Bonus Act.
>
> (i) Rs. 23,455 on account of development rebate allowable under the Income-tax Act,
>
> (ii) Rs. 35,682 on account of development reserve."

2. Pursuant to the above agreement the Governor of Bihar referred for adjudication of the Industrial Tribunal the disputes referred to in sub-clauses (*a*), (*b*) (i) and (*b*) (ii) of clause (2) of the said agreement. Before the Tribunal it was contended on behalf of the appellants that the amount in sub-clause (*a*) of the reference cannot be deducted from the gross profits because it is a rebate to consumers and is paid from out of profits. It cannot, therefore, be shown in the revenue accounts of the company as an item of expenditure and must be added back for the purpose of calculation of bonus. In respect of the amount in sub-clause (*b*) (i) of the reference the contention is that it cannot be deducted as a rebate and if it has to be deducted, it has to be added back also. It was lastly contended in respect of the amount in sub-clause (*b*) (ii) of the reference that the deduction is not contemplated by item 6 of the Third Schedule to the Bonus Act.

3. On 16th January, 1967, the Tribunal gave the following award:

(1) In respect of the sum of Rs. 18,086 it held—

(*a*) that although the aforesaid sum represented the amount of rebate payable to the consumers and not to be retained by the company, nonetheless it was a profit for the purpose of computation in order to arrive at the amount which the workers should get as bonus ;

(*b*) that the aforesaid amount of Rs. 18,086 which has been retained by the management to be returned to the consumes later on, must be taken as a reserve within the meaning of Item 2 (*e*) of the Second Schedule of

the Bonus Act, 1965, and has to be added back; and

(c) that the sum of Rs. 18,086 which was deemed to be a reserve and had to be added back under item 2 (e) of the Second Schedule of the Bonus Act was not an amount to be deducted as a reserve under section 6 (d) of the Bonus Act and, therefore, could not be deducted for the purposes of the computation of profits for payment of bonus.

(2) That in regard to the amount of Rs. 23,455 the Tribunal held that merely because the company has, for some reason or other, omitted to mention the aforesaid amount in the profit and loss account that would not prevent the same being added back particularly when the same is being claimed as deduction under the provisions of the Bonus Act. Accordingly it came to the conclusion that the deducton of Rs. 23,455 on account of the development rebate allowed under the Income-tax Act from the gross profits without adding back to it is not in accordance with the Bonus Act.

(3) In so far as the sum of Rupees 35,682 which has been both added and deducted, the Tribunal held that the amount has been rightly deducted under clause (d) of section 6 of the Bonus Act for the purpose of arriving at the available surplus.

4. By a writ petition the respondents challenged the validity of the award which was against them, and the workmen by a separate writ petition contested the validity of the award which was against them. The High Court which heard both these petitions together came to the conclusion that the decision of the Tribunal on item (1) (a) of the reference directing the respondents to add back Rs. 18,086 for calculating the gross profits was wrong and it was accordingly quashed. The remaining portion of the award which disallowed the deduction of the said sum from the gross profits was maintained. As regards item (b) (i) of the reference relating to the sum of Rs. 23,455 shown as development rebate, it held that the portion of the award which directed that it should be added back to the net profits to calculate the gross profits under clause (2) (d) of the Second Schedule of the Bonus Act was also wrong and it was accordingly quashed. In respect of the award on clause (b) (ii) of the reference it maintained the award of the Tribunal. In the result the respondents' petition was allowed and the appellants' petition dismissed.

5. Against the aforesaid decision, these appeals are by certificate granted by the High Court.

6. The dispute between the company and the workmen, as already stated, arose in respect of the permissible additions and deductions to be made to the profits for the purpose of ascertaining the bonus payable to the workmen under the provisions of the Bonus Act. The balance-sheet of the Company for the year ending 31st March, 1965, showing the profit and loss account was duly published and there was a controversy between the company and its workmen as regards three items mentioned in the profit and loss account which were also the subject-matter of the reference. The first item related to a sum of Rs. 18,086 representing the rebate payable to the consumers under Paragraph II (i) of the Sixth Schedule to the Electricity (Supply) Act, 1948—hereinafter called the Electricity (Supply) Act; the second one related to a sum of Rupees 23,465 on account of development rebate allowable under the Income-tax Act, 1961; and the third one related to a sum of Rupees 35,682 in respect of development reserve,

7. The learned Advocate for the appellants, however, at the outset indicated that he was not challenging the decision of the High Court in respect of the second item of Rs. 23,455 deducted under the Income-tax Act, 1961, as development rebate. This leaves the first and the third items, one in respect of Rs. 18,086 which has been directed by the High Court to be deducted on account of rebate payable to the consumers under Paragraph II (i) of the Sixth Schedule to the Electricity (Supply) Act, and the third item in respect of Rs. 35,682 on account of development reserve.

8. It may be mentioned that the computation and payment of bonus under the Bonus Act is provided on unit-wise basis in accordance with the formula laid down under that Act. As far as this case is concerned, the payment of bonus is related to the profits of the year subject to the maximum bonus and an amount available by way of set-on. As the company is not a banking company to which the First Schedule is applicable the method of computation of gross profits is laid down in the Second Schedule to the Bonus Act. Section 6 enumerates the deductions that have to be made out of the gross profits in order to arrive at the available surplus. The deductions consist of depreciation, development rebate, direct taxes and items mentioned in the Third Schedule. It may be observed that rehabilitation grant is left over as an item of deduction from gross profit, which is a departure from what was required to be deducted under the Full Bench formula of the Labour Appellate Tribunal. The amount of depreciation and development rebate are to be arrived at as provided under the Income-tax Act. In case of depreciation, however, if one employer has been paying bonus to his employees under an award, agreement, or settlement made before the commencement of the Bonus Act and subsisting at such commencement after deducting from the gross profits, then the depreciation deducted, at the option of the employer, shall be the notional normal depreciation. Section 2 (4) defines "allocable surplus" as meaning "(*a*) in relation to an employer, being a company (other than a banking company) which has not made the arrangements prescribed under the Income-tax Act for the declaration and payment within India of the dividends, payable out of its profits in accordance with the provisions of section 194 of that Act, sixty-seven per cent of the available surplus and includes any amount treated as such under sub-section (2) of section 34." "Available surplus" is defined in section 2 (6) as meaning "the available surplus computed under section 5." Section 4 provides for computation of gross profits in the manner provided by the First Schedule in the case of a banking company and in other cases in the manner provided by the Second Schedule. By section 5 the "available surplus" in respect of any accounting year is the gross profit for that year after deducting therefrom the sums referred to in section 6. The sums liable to be deducted from gross profits under section 6 are:

(*a*) any amount by way of depreciation admissible in accordance with the provisions of sub-section (1) of section 32 of the Income-tax Act or in accordance with the provisions of the agricultural income-tax law, as the case may be;

(*b*) any amount by way of development rebate or development allowance which the employer is entitled to deduct from his income under the Income-tax Act;

(*c*) any direct tax which the employer is liable to pay for the accounting year in respect of his income, profits and gains during that year; and

(*d*) such further sums as are specified in respect of the employer in the Third Schedule.

9. Counsel for the workmen says that the company has shown a certain amount as its net profit in the profit and loss account. Rebate payable to the consumers of electricity cannot be deducted so as to reduce the net profit shown in the profit and loss account, because Entry I of the Second Schedule to the Bonus Act is "net profit as per profit and loss account". It may be mentioned that Paragraph II (i) of the Sixth Schedule to the Electricity (Supply) Act provides that if the "clear profit" of a licensee exceeds the amount of reasonable return, the excess has to be divided into three equal portions. One portion has to be given as a rebate to the consumers; another portion is set apart as Tariffs and Dividends Control Reserve: and the third portion is kept apart for distribution as a proportionate rebate on the amounts collected from the sale of electricity and meter rentals or carried forward in the accounts of the licensee for distribution to the consumers in future in such manner as the State Government may direct. A perusal of Paragraph II (i) of the Sixth Schedule to the Electricity (Supply) Act would show that the portion that is set apart as a rebate to the consumers has not been described as a reserve in the same manner as the other portions have been described, for the simple reason, that the amount has to be returned to the consumers in the form of a rebate. If rebate is given to the consumers in respect of the electricity consumed by them and for which payment has already been made it is apparent that the price of electricity which the consumers will in fact pay, after receiving the rebate, would be the actual price paid by them for the electricity consumed. To put it differently the charges paid by the consumers of electricity before the rebate is given to them would be treated as payments on account or provisional payments and it is only after the end of the year when rebate is ascertained and paid to them in accordance with the provisions of the Electricity (Supply) Act that the charges recovered for supply of electricity could be said to be finalised. On this assumption it would appear that any amount in the hands of the undertaking liable to be returned to the consumers as rebate cannot be taken into account in computing the gross profits of the undertaking. It is only after deducting this amount that the actual revenue of the supply undertaking could be computed. If this assumption is correct, and we think it is, then the amount to be returned as rebate to the consumers is a deductible item. We cannot accept the contention of the learned Advocate that this item not being an expenditure necessary for earning a profit, is not deductible. The basic assumption underlying the contention that consumers' rebate has been deducted as an expenditure has no validity. In *Poona Electric Supply Co., Ltd.* v. *Commissioner of Income-tax, Bombay*[1], this Court, while dealing with the Income-tax Act, considered the effect of Paragraph II (*i*) of the Sixth Schedule to the Electricity (Supply) Act and held that the amounts set apart for rebate and for which deduction was claimed were a part of the excess amount paid to the assessee-company and reserved for being returned to the consumers. They did not form part of the assessee's real profits and, therefore, to arrive at the taxable income of the assessee from the business under section 10 (1) of the Income-tax Act, the said amounts had to be deducted from its total income. Even though, this case was decided under the Income-tax Act, the provision of the Electricity (Supply) Act which we have interpreted was also interpreted by this Court in that case. In *Jabalpur Bijilighar Karmachari Panchayat* v. *Jabalpur Electric Supply*

1. (1965) 2 S.C.J. 343: (1965) 2 I.T.J. 234: (1965) 3 S.C.R. 818: 57 I.T.R. 521: A.I.R. 1966 S.C. 30.

Co., Ltd.[1], the question was again considered by a Bench of this Court to which one of us (Jaganmohan Reddy, J.,) was a party. At page 75, it was observed by reference to what the Tribunal had held:

> "This goes to show that the rebate to the consumers is not to be utilised by the company except for distribution to the consumers as may be directed. If the company cannot have the benefit of it, it stands to reason that the worker cannot ask for a share and the claim of the appellant for inclusion of this sum must be rejected."

In our view there is no doubt that the amount payable as consumers' rebate under the Electricity (Supply) Act has to be deducted before profits could be computed and has been rightly held to be deductible by the High Court.

10. The last item of reference is whether the sum of Rs. 35,682 can be legally appropriated by the licensee to the development reserve in respect of the accounting year 1964-65 and deducted under item 6 of the Third Schedule to the Bonus Act. It appears that before the High Court an affidavit was filed by the company which gave particulars of the break up of the development reserve of Rupees 35,682 as having been incurred in the four years including and preceding the year 1964-65 for which the bonus was being considered. The proportionate development reserve for the year 1961-62 was Rs. 4,864; for the year 1962-63 Rs. 1,671; for the year 1963-64 Rs. 18,602 and for the year 1964-65 Rs. 10,555. On behalf of the workmen it was urged that only a sum of Rs. 10,555 being the proportionate development reserve calculated on the development rebate for the year 1964-65 was permissible, but no addition could be made for the proportionate development reserve in respect of the years 1961-62, 1962-63 and 1963-64. The argument on behalf of the company which was accepted by the learned Judges of the High Court was that the funds in the hands of the company did not permit of any sum being appropriated as development reserve in the years 1961-62, 1962-63 and 1963-64, and as under the proviso to sub-paragraph (1) of paragraph V-A of the Sixth Schedule to the Electricity (Supply) Act reasonable return had to be provided for the company which could not be provided because there were not sufficient funds available for development reserve, all the sums which should have been appropriated in the years of account preceding the year in question were appropriated in the year 1964-65. The High Court thought that the development reserve had to be calculated for each year in the manner indicated in sub-paragraph (1) of paragraph V-A of the Sixth Schedule to the Electricity (Supply) Act, but the actual appropriation may be spread over a period of five years in order to ensure that the reasonable return to the licensee is not impaired. Though normally the "annual instalments' specified in sub-paragraph (2) of paragraph V-A of the Sixth Schedule to the Electricity (Supply) Act may indicate that some amount must be appropriated every year but on a strict construction of sub-paragraph (2) along with the proviso to sub-paragraph (1) of paragraph V-A, it was of the view that in order to secure a reasonable return, no amount may be available for appropriation to the development reserve in some years, and that in such contingencies, there seems to be no legal bar if the instalments for some of the years are reduced to zero, and the entire sum is appropriated in a succeeding year, provided that the maximum period of five years is not exceeded. It was also pointed out by the learned Judges that the actual language used by the Legislature in item 6 of the

1. (1972) 1 S.C.R. 60: A.I.R. 1972 S.C. 70.

Third Schedule to the Bonus Act shows that any sum which is "required to be appropriated by the licensee in respect of the accounting year to a reserve under the Sixth Schedule to that Act shall also be deducted" showed that the emphasis was on the sum "required to be appropriated" in respect of the accounting year and not the sum calculated in respect of the accounting year. Hence, the various sums calculated as development reserve for preceding years also, if permitted by sub-paragraph (2) of paragraph V-A of the Sixth Schedule to the Electricity (Supply) Act to be appropriated in the accounting year 1964-65 will come within the scope of item 6 of the Third Schedule to the Bonus Act and hence deductible.

11. The arguments before us have also followed the same contentions which found favour with the High Court, but, in our view, those contentions are not supported by the language of item 6 of the Third Schedule to the Bonus Act. That item is as follows:

Item No.	*Category of employer.*	
6	Any employer falling under Item No. 1 or Item No. 3 or Item No. 4 or Item No. 5 and being a licensee within the meaning of the Electricity (Supply) Act, 1948.	Further sums to be deducted : In addition to the sums deductible under any of the aforesaid Items, such sums as are *required to be* appropriated by the licensee *in respect of* the accounting year to a reserve under the Sixth Schedule to that Act shall also be deducted. (Italics added).

The view of the High Court would have been correct, if the words in Item 6 were "such sums as are appropriated by the licensee in the accounting year to a reserve under the Sixth Schedule to that Act". If these words were there, it may be that the allocations of development reserve in respect of the previous years in the accounting year would have also become deductible. But the High Court has overlooked the expressions "required to be appropriated..........under the Sixth Schedule to that Act" and "in respect of". The words "required to be appropriated" indicate that the company should be obligated under the Sixth Schedule to the Electricity (Supply) Act to appropriate an amount to the development reserve funds. The words "in respect of" have a wide connotation and being colourless are generally intended to convey a connection or relation between the two subject-matters to which they refer. In the context in which they have been used, they mean "connected with" or "relating to". The first requirement for the applicability of Item 6 of the Sixth Schedule to the Electricity (Supply) Act should, therefore, be a legal obligation on the company to approrpiate an amount to the development reserve fund. The second requirement is that the appropriation made must be connected with or related to the accounting year. Clause 5 (*a*) (i) of the Sixth Schedule to that Act also speaks of appropriation to the development reserve "in respect of each and every accounting year." The phrase "accounting year" does not appear to have been defined in that Act. Instead, the expression "the year of account" is defined in section 2 (14) of that Act. It means the financial year in relation to a licensee. The expression "accounting year" has been defined in section 2 (1) of the Bonus Act. In respect of the company, it would mean "the period in respect of which any profit and loss account of the company laid before it in annual general meeting is made up,

whether that period is a year or not." The company prepared its profit and loss account in 1964-65. So for purposes of Item 6 in the Third Schedule, the accounting year of the company would be 1964-65. Section 5 of the Bonus Act provides that the available surplus "in respect of any accounting year" shall be the gross profits for that year after deducting therefrom the sums referred to in section 6. The amount which could be deducted is the amount which is required to be appropriated by the licensee in respect of the accounting year 1964-65. A reference to sub-paragraphs (1) and (2) of paragraph V-A of the Sixth Schedule to the Electricity (Supply) Act does not justify the submission that the sums which could have been appropriated for the years, 1961-62, 1962-63 and 1963-64 were the amounts required to be appropriated in the accounting year 1964-65. Paragraph V-A, in our view deals only with appropriations to a development reserve for the year of account, which in this case would be 1964-65, and if in that year the whole of the development reserve could not be appropriated to the reserve, sub-paragraph (2) of paragraph V-A permits the appropriation in annual instalments spread over a period not exceeding five years from the commencement of that accounting year. Sub-paragraphs (1) and (2) of paragraph V-A of the Electricity (Supply) Act which are relevant are as follows:

"V-A. (1) There shall be created a reserve to be called the Development Reserve to which shall be appropriated in respect of each accounting year a sum equal to the amount of income-tax and super-tax calculated at rates applicable during the assessment year for which the accounting year of the licensee is the previous year, on the amount of development rebate to which the licensee is entitled for the accounting year under clause (vi)(*b*) of sub-section (2) of section 10 of the Indian Income-tax Act, 1922: Provided, that if in any accounting year the clear profit (excluding the special appropriation to be made under item (va) of clause (*c*) of sub-paragraph (2) of paragraph XVII) together with the accumulations, if any, in the Tariffs and Dividends Control Reserve less the sum calculated as aforesaid falls short of the reasonable return, the sum to be appropriated to the Development Reserve in respect of such accounting year shall be reduced by the amount of the shortfall.

(2) Any sum to be appropriated towards the Development Reserve in respect of any accounting year under sub-paragraph (1), may be appropriated in annual instalments spread over a period not exceeding five years from the commencement of that accounting year."

12. As we have noticed earlier, the words "that accounting year" refer to the year of account in respect of which appropriation to the reserve and the deduction under the Bonus Act is being considered. In this case, the deductions for the years 1961-62, 1962-63 and 1963-64 are not being considered, nor have there been any appropriations in terms of paragraph V-A of the Sixth Schedule to the Electricity (Supply) Act in the respective accounting years. There is nothing in sub-paragraph (1) or (2) of paragraph V-A of the Sixth Schedule to the Electricity (Supply) Act which justifies the submission that what has not been appropriated for the earlier years could be appropriated in the year of account. In this view, the only amount that is deductible on account of development reserve as contended by the appellants in Rs. 10,555 in respect of the accounting year 1964-65. The award of the Tribunal and the judgment of the High Court directing the deduction of Rs. 35,682 cannot be sustained and are

set aside. Instead we direct the deduction of Rs. 10,555 only.

13. The result is that the appeals are partly allowed, but in the circumstances each party will bear their own costs.

V.M.K. *Appeals partly allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*A. Alagiriswami, I. D. Dua and C. A. Vaidialingam, JJ.*

Kaliamma .. *Appellant* *

v.

Janardhanan Pillai and others .. *Respondent.*

Hindu Law—Custom—Proof—Krishnanvaka community in Kanyakumari district—Custom of special kind of Pathnibagam *under which even a daughter was entitled to a share—If prevails.*

The argument that in the Krishnanvaka community in the Kanyakumari district of Tamil Nadu there is a custom of a special kind of *pathnibagam* under which even a daughter is entitled to a share just as a son, is untenable. It is true that this community is a very small community found within a small local area and the cases that are likely to arise in that community which will reach the Courts may not be many. But merely on that ground the well-established principle that before a custom can be held as having been proved on the basis of earlier decisions, these decisions should have been based on evidence adduced in respect of the cases, cannot be ignored. That test is not satisfied in this case. [*Para.* 10.]

Thus while the existence of the custom of *pathnibagam* in the community may be said to have been established, the special kind of *pathnibagam* pleaded cannot be said to have been established.

Cases referred to :—

Collector of Madura v. *Moottoo Ramalinga Sathupathy,* (1868) 12 M.I.A. 397 : 1 Beng. L.R. 1; *Rama Rao* v. *Raja of Pittapur,* I.L.R. 41 Mad. 778 : A.I.R. 1918 P.C. 81; *Pemraj* v. *Chand Kanwar,* (1947) 2 M.L.J. 516 : A.I.R. 1948 P.C. 60; *Ujagar Singh* v. *Mst. Jeo,* (1959) 2 S.C.R. (Supp.) 781 : A.I.R. 1959 S.C. 1041; *Palaniappa Chettiar* v. *Alagan Chetti,* I.L.R. 44 Mad. 740 : A.I.R. 1922 P.C. 228; *G. Sumrun Singh* v. *Khedun Singh,* (1814) 2 S.D.A. Beng. 117; *Avikutti Bhagavathi and another* v. *Chithambarathanu Mathevan,* (1890) 8 T.L.R. 51; *Ramaswami Sadasivan* v. *Thanu Gouri,* (1904) Kolappa Pillai's U.I. C.P.; *Nagaru Pillai Saraswathi Amma* v. *Thanu Pillai,* (1944) T.L.R. 710; *Hemangini Dasi* v. *Kedarnath,* (1889) I.L.R. 16 Cal. 758 : 16 I.A. 115.

The Judgment of the Court was delivered by

Alagiriswami, J.—This is an appeal by Special Leave against the judgment of the High Court of Madras in Second Appeal.

2. The appellant is the daughter of one Ayyappan Mathevan Pillai, who died on 17th January, 1949, by one of his wives, the second respondent. The first respondent is his son by another wife. The parties belong to the Krishnanvaka community found mainly in the Kanyakumari district of Tamil Nadu. During the appellant's minority her mother and the first respondent entered into a deed of partition under which the appellant was given 9 out of 79 items belonging to her father. She filed the suit out of which this appeal arises for partition and possession of a half share in all her father's properties. Her claim was based on the allegation that in the community to which the parties belong there was a custom of a special kind of

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* C.A. No. 1251 of 1967. *8th February, 1973.*

pathnibhagam. While under the ordinary pathnibhagam a man's sons by different wives get their shares on the basis that whatever their number the property is divided according to the number of wives he had, rather than on a *per capita* basis, the special kind of pathnibhagam pleaded by the plaintiff was that even a daughter was entitled to share on the same basis. She pleaded that as Mathevan Pillai had two wives and she was the daughter by one wife and the 1st defendant the son by the other wife each of them was entitled to a half share.

3. The learned Subordinate Judge who tried the suit, on a consideration of the evidence in the case, as also various earlier decisions regarding this custom held against the plaintiff. On appeal the District Judge of Kanyakumari without going into the evidence but on the basis of some earlier decisions allowed the appeal. In the Second Appeal before the High Court the learned single Judge took the view that the decisions relied on by the District Judge cannot be said to have established the existence of the special custom pleaded by the plaintiff. The 1st defendant also sought to sustain the partition deed on the basis that it was the result of a family arrangement. But the learned Judge did not think it necessary to go into that question in the view he took regarding the custom pleaded by the plaintiff.

4. The question that arises for decision in this case is whether the custom pleaded by the appellant has been established. On behalf of the appellant reliance was not placed on the evidence in the case to establish the custom. The argument was simply based on certain earlier decisions regarding the prevalence of the custom of pathnibhagam among the community to which the parties belong. The legal position regarding the place of customary law among the Hindus is now well-established. In the *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*[1]. It was observed by the Privy Council :

> " Under the Hindu system of law clear proof of usage will outweigh the written text of the law."

In *Rama Rao* v. *Rajah of Pittapur*[2] the Privy Council observed :

> " When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading."

In *Pemraj* v. *Chand Kanwar*[3] the Privy Council observed :

> " It is not doubtful that the ordinary rule is that a party relying on a custom .... which is at variance with the ordinary Hindu Law must allege and prove it. But it is equally beyond doubt that a custom which has been recognised and affirmed in a series of decisions, *each of them based on evidence adduced in the particular case*, may become incorporated in the general law, with the result that the onus of proof no longer lies on those who assert it but upon those who assert an exception to it.".

The latest decision is that of this Court in *Ujagar Singh* v. *Mst. Jeo*[4] wherein after referring to the statement of law in *Rama Rao* v. *Rajah of Pittapur*[2], earlier referred to, this Court pointed out that " when a custom has been so recognised by the Courts, it passes into the law of the land and the proof of it then becomes unneces-

1. (1868) 12 M.I.A. 397 : 1 Berg. L.R. 1.
2. I.L.R. 41 Mad. 778 : A.I.R. 1918 P.C. 81.
3. (1947) 2 M.L.J. 516 : A.I.R. 1948 P.C. 60.
4. (1959) 2 S.C.R. (Supp.) 78 : A.I.R. 1959 S.C. 1041.

sary under section 57 (1) of the Evidence Act." In the particular circumstances of that case this Court pointed out that there was a formidable array of authorities in support of either view, and, therefore, went into the evidence and held that the respondent therein had proved a custom whereby a sister was entitled to succeed in preference to the collateral relations of her brother.

5. Now let us see whether in the community to which the parties belong the rule of pathnibhagam with the special modification of that rule pleaded by the plaintiff is prevalent. That the rule of pathnibhagam is prevalent in various parts of the country there is no doubt. In *Palaniappa Chettiar* v. *Alagan Chetti*[1] the Privy Council referred to the statement of law by Mayne in his Hindu Law (Edn. 7), Para. 473 to the following effect :

> " In some families, however, a custom called pathnibhaga prevails of dividing according to mothers, so that if *A* had two sons by his wife *B* and three sons by *C*, the property would be divided into moieties one going to the sons by *B* and the other to the sons by *C*; *G. Sumrun Singh* v. *Khedun Singh*[2]. This practice prevails locally in Oudh, as evidenced by numerous Wajib-Ul arz, which I have seen in cases under appeal to the Privy Council."

They also referred to the prevalence of the custom in many parts of Southern India, as referred to by Mr. Ellis, on page 357 of Vol. II of Strange, and at page 167 of that work to the following effect :

> "The division of estates, is in case of one person having several families by different women, among the families in equal shares without reference to the number of persons in each."

1. I.L.R. 44 Mad. 740: A.I.R. 1922 P.C. 228
2. (1814) 2 S.D.A. Beng. 117.

Their Lordships, therefore, approached the evidence in that case with a knowledge that such a custom does exist, and was not an improbable one in the particular case, and after examining the evidence came to the conclusion that the custom of pathnibhaga was proved.

6. We may now refer to the decisions that were cited before the Courts below and were relied upon before this Court. The earliest one is a decision of the year 1890, in *Ayikutti Bhagavathi and another* v. *Chithambarathanu Mathevan*[1], where the effect of the evidence was stated as follows :

> " From the evidence on both sides, it is clear to us that Krishnanvakaktar to which the parties belong, follow the Hindu Law with one or two points of divergence from it, *viz.*, the widow cohabiting with the brother of her deceased husband and *the existence of Pathnibhagam.*"

The next decision is of the year 1904 in *Ramaswami Sadasivan* v. *Thanu Gouri*[2], reported in Kolappa Pillai's unreported important cases, p. 179. Here again on a consideration of the evidence it was held that the preponderance of evidence as a whole was in favour of Pathnibhagam. But one of the learned Judges observed :

> " The Pathnibhagam which prevails in this community seems to go even beyond the usual custom known as Pathnibhagam .... that it is not only sons of different mothers that take *per stirpes* (according to the number of mothers) but when one mother has got only female issue and another a male issue the female issue gets a half share in their father's properties and the male issue by the other wife of the father takes the other half."

1. (1890) 8 T.L.R. 51.
2. (1904) Kolappa Pillai's U.I.C.P.

It is upon this decision that the plaintiff based her whole case. It must be pointed out, however, that the learned Judge did not go into the evidence regarding the particular type of pathnibhagam which was stated to be prevalent among this community. Nor was it necessary to decide that question for the purpose of that case. It was a mere passing observation and this is a solitary case in which such a special custom is mentioned.

7. We then come to another decision of the year 1944, in *Nagaru Pillai Saraswathi Amma* v. *Thanu Pillai*[1]. In that case also the special custom pleaded by the plaintiff did not arise for decision. What was urged was the right of absolute ownership for a widow of a member of a Krishnanvaka community. The argument was that the existence of Pathnibhagam in the community implied the principle that on the death of the husband of a Krishnavakakar woman, in the absence of his children, she was entitled to inherit her husband's property absolutely. This contention was rejected but the decision proceeded on the basis that the custom of Pathnibhagam was prevalent in this community.

8. There is a decision of the District Court of Nagercoil in O.S. No. 109 of 1096 M.E., dated 22nd December, 1923, marked Exhibit A-6, wherein it was observed :

> "But it has been held in Kolappa Pillay, page 179 that in the community Krishnavakakars to which the parties belong that when a man dies leaving two wives even though one wife might have only female issues such female issues are entitled to a half share as the Patnibhagam to their mother. It appears to me therefore that under the ruling in Kolappa Pillay's select decisions cited before in which *Avikutti Bhagawathi and another* v. *Chithambarathan Mathevan*[1] and *Hemangini Dasi* v. *Kedarnath Kundu*[2] have been cited and followed, plaintiffs are also entitled to a half share in the assets of Kunchan."

There is another decision of the District Munsiff's Court of Kuzhithurai in C.S. No. 18 of 1959, dated 2nd January, 1960, wherein it was observed :

> "Exhibit B-26 judgment proceeded on the basis that as the parties belonged to Krishnan Vakakkar Community *per capita* division among them is not allowable. That community does not follow Hindu Mitakshara Law. There is authority for the position that this community follows the system known as Patnibhagam under which property of the deceased is inherited according to the number of widows he had irrespective of the existence of the children to the deceased."

This decision recognised the existence of Patnibhagam but not the special custom pleaded by the plaintiff.

9. It is thus seen that most of the decisions either expressly or implicitly recognised the existence of custom of Patnibhagam in this community, but the decision found in Exhibit A-6 is the only one on the special kind of Patnibhagam pleaded by the plaintiff and is directly in point. But even this decision did not proceed on the basis of the evidence in the case. It relied on the observation of the learned Chief Justice in the decision already referred to, in *Nagaru Pillai Saraswathi Amma* v. *Thanu Pillai*[3]. This observation was not, however, based on a discussion of the evidence and was not necessary for the decision in that case, as already pointed out.

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1. 1944 T.L.R. 710.

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1. (1890) 8 T.L.R. 51.
2. 16 I.A. 115 : (1889) I.L.R. 16 Cal. 758. (P.C.)
3. (1944) T.L.R. 710.

10. While it is true that this community is a very small community found within a small local area and the cases that are likely to arise in that community, which will reach the Courts may not be many, we cannot merely on that ground, ignore the well established principle that before a custom can be held as having been proved merely on the basis of earlier decisions, those decisions should have been based on evidence adduced in respect of the cases. That test is not satisfied in this case. Neither of the two decisions which refer to the special kind of Patnibhagam pleaded by the plaintiff was based on the evidence in the case. Thus while the existence of the custom of Patnibhagam in the community may be said to have been established, the special kind of Patnibhagam pleaded by the plaintiff cannot be said to have been established and the appellant cannot succeed unless she establishes the latter. In this view it is unnecessary to go into the question of family arrangement.

11. The appeal is dismissed with costs of the 1st respondent to be paid by the appellant.

V.K. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*V. R. Krishna Iyer and R. S. Sarkaria, JJ.*

M/s. Murthy Match Works, etc., etc. .. *Appellants**

v.

The Assistant Collector of Central Excise, etc. .. *Respondents.*

(A) *Constitution of India* (1950), *Article* 14—*Reasonable classification—What is—Tests.*

(B) *Central Excise and Salt Act* (*I of* 1944), *section* 37 (1)—*Notification No.* 162 *of* 1967 *issued under—Validity—If violative of Article* 14 *of the Constitution—Judicial review—How far permissible.*

It is true that a State may classify persons and objects for the purpose of obtaining revenue or other objects. Every differentiation is not a discrimination. But classification can be sustained only if it is founded on pertinent and real differences as distinguished from irrelevant and artificial ones. The constitutional standard by which the sufficiency of the differences which form a valid basis for classifcation may be measured has been repeatedly stated by the Courts. If it rests on a difference which bears a fair and just relation to the object for which it is proposed it is constitutional. To put it differently, the means must have nexus with the ends. Even so, a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. In

*C.As. Nos. 1752 to 1769 of 1970.
17th January, 1974.

this imperfect world perfection even in grouping is an ambition hardly ever accomplished. The question of classification is primarily for legislative judgment and ordinarily does not become a judicial question. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judicature cannot rush in where even the Legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation.

[*Para.* 15.]

One facet of the equal protection clause upheld by the Indian Courts is that while similar things must be treated similarly, dissimilar things should not be treated similarly. There can be hostile descrimination while maintaining a facet of equality. [*Para.* 16.]

Another proposition which is equally settled is that merely because there is room for classification it does not follow that legislation without classification is always unconstitutional. The Court cannot strike down a law because it has not made the classification which commends to the Court as proper. Nor can the legislative power be said to have been unconstitutionally exercised because within the class a sub-classification was reasonable but has not been made.

[*Para,* 18.]

In the present case, a pertinent principle of differentiation which is visibly linked to productive process, has been adopted in the broad classification of power-users and manual manufacturers. It is irrational to castigate this basis as unreal. Indeed the soundness of this distinction is not denied. The challenge is founded on the failure to mini-classify between large and small sections of manual match-manufacturers. But it is not for the Courts to reason why, that being a policy decision of Government dependent on pragmatic wisdom playing on imponderable forces at work. The Court's jurisdiction halts where the constitutional touchstone of a rational differential having a just relation to the legislative end to revenue raising is satisfied. Absolute justice to every producer is a self-defeating adventure for any administration and general direction, not minute classification, is all that can be attempted. For these reasons the High Court was right in not striking out the Notification No. 162 of 1967 issued under section 37 (1) of the Central Excise and Salt Act, 1944, as discriminatory under Article 14 of the Constitution of India. [*Para.* 20.]

Cases referred to:—

United States v. *Butler*, (1936) 297 U.S. 1 : 56 Sup. Ct. 312: 80 Law. Ed. 477 : *American Constitutional Law*—Third Edn. by Tresolini and Shapiro; *Bain Peanut Co.* v. *Pinson*, (1930) 282 U.S. 499 ; *K. T. Moopil Nair* v. *State of Kerala*, (1961) 3 S.C.R. 77 : (1961) 2 S.C.J. 269: A.I.R. 1961 S.C. 552 ; *State of Kerala* v. *Haji K. Haji Kutty Naha*, (1969) 1 S.C.J. 691 : (1969) 1 S.C.R. 645 : A.I.R. 1969 S.C. 378 ; *Khandige Sham Bhat* v. *The Agricultural Income-tax Officer*, (1963) 3 S.C.R. 809 : (1963) 1 S.C.J. 140 : 48 I.T.R. (S.C.) 21 : A.I.R. 1963 S.C. 594.

The Judgment of the Court was delivered by

Krishna Iyer, J.—The core of the contention urged by the appellants in these various appeals filed by certificate under Article 133 (1) (*a*) and (*c*) of the Constitution is that the excise duty on matches sought to be levied on these medium-sized manufacturers of Shivakashi wears the mask of equality but in its true face bears the marks of unequal justice violative of Article 14 of the Constitution of India.

2. Shri Chitale, learned Counsel for the appellants, has focused his arguments on one grievance only—and, we think, with good reason—that the discriminatory fiscal treatment of his clients is unconstitutional, the vice being treatment of dissimilar categories similarly. To compress his whole argument in a single sentence, it is that the appellants, small manufacturers of matches, have been subjected by the impugned notification to excise duty at the same onerous rate as has been applied to larger producers, wilfully indifferent to a historically well-recognised classification between the smaller and the larger group of match manufacturers, and the injury sustained flows from this failure to classify and deal differentially with sets of producers who are unequal in their economic capabilities in the matter of production, and marketing—a sort of traumatic egality. In brief, equal treatment of unequal groups may spell invisible yet substantial discrimination with consequences of unconstitutionality. That dissimilar things should not be treated similarly in the name of equal justice is of Aristotelian vintage and has been, by implication, enshrined in our Constitution.

3. The facts which unfold the case of the appellants may now, be set out. The match industry in India has grown over the decades and Shivakashi occupies an important place in the production geography of matches. From the point of view of manufacturing techniques, the safety match industry in our country comprises two distinct categories—the mechanised sector occupied by a few big whales and the non-mechanised sector comprising varying sizes of production units ranging from the small fry organised on a cottage industry basis to considerable producers who have developed manufacturing and marketing muscles sufficient to compete with the power-using big four—the WIMCO, the AMCO, the ESAVI, and the Pioneer. The Tariff Commission Report on this Industry has stated :

"Unlike units in the mechanised sector which have power-driven equipment for carrying out all the important operations including manufacture of splints and veneers, frame filling, dipping, box-making, etc., those in categories "B" and "C follow almost identical manufacturing process, obtaining their splints and veneers from outside suppliers and getting such important operations as box-making and frame filling done by outside domestic labour on piece-rate basis. Only such of the processes as dipping, box-filling, banderolling and packing which under Excise or Explosives Act regulations cannot be entrusted to outside labour are carried out in the factory sheds of the units and the workers employed for these also are mostly paid on piece-rate basis. All the operations, whether undertaken in the factory premises or passed on to outside piece-work labour to be carried out in the homes of the latter conjointly with other members of the family, are done by manual process. The same system is followed by "D" category units as well, except those sponsored by K. & V.I.C. some of which manufacture their own splints and veneers."

4. Classified on the basis of quantity, turnout and other germane factors, a fourfold categorisation into "A", "B", "C" and "D" was extant in the industry roughly corresponding to the techniques of production and the use of power adopted by each. The Tariff Commission explained this aspect and reported on the operation of the differential excise levy system on production and trade practices. Counsel for the appellants has rested his case of discrimination by subversive equality or rather non-discri-

mination where a deserving differentiation is the desideratum, on the findings of the Tariff Commission Report. We might as well give copious but relevant excerpts from it to discern the foundation of the argument. The report runs on to state :

"As indicated in Appendix II, according to the excise tariff classification, units in the match industry now stand grouped into four classes, namely, 'A', 'B', 'C' and 'D' not on any technological differentiation but on the basis of output — 'A' class comprising factories whose annual output exceeds 4,000 million match sticks, 'B' class comprising factories whose annual output exceeds 500 million match sticks but does not exceed 4,000 million match sticks, 'C' class comprising factories whose annual output exceeds 50 million match sticks but does not exceed 500 million match sticks and 'D' class comprising factories whose annual output does not exceed 50 million match sticks. According to this classification the factories belonging to WIMCO, AMCO and ESAVI fall under category 'A', the rest comprising the units in the non-mechanised sector fall under the other three categories, namely, 'B', 'C' and 'D'".

....

"Selling system :

(*iv*) *Small producers.*—The system of selling adopted by these manufacturers varied according to their status and financial resources. The system almost universally followed by such producers is to make outright sales, without any discount or commission to wholesalers, both out-station and local. The bigger, among such producers belonging to category 'B' are reported in some cases to sell as well through dealers and sole selling sgents. Many of them have also got their own depots and regular stockists in a limited number of out-station centres. As regards 'C' and 'D' class producers, the system of sales covers the following variants according to facilities available to them : (*i*) outright sales to wholesale merchants, local or out-station; (*ii*) sales through joint schemes of depots which stock different brands from several producers ; (*iii*) sales by sending goods in their own vans in bulk to distributors and dealers in nearby States ; and (*iv*) sales through their own salesmen who deliver goods in local markets to the shopkeepers on bicycles (a special feature of 'D' class units.

From the replies received by us from units in the small scale sector it would appear that those in category 'B' situated in the Sivakasi/Sattur/Kovilpatti area have over some years in the past established contacts and developed a fairly wide selling system enabling them to cater to the markets in distant States, including West Bengal, U. P., Delhi, Gujarat and practically all the States in the South. The size of their operations has all along enabled them to undertake supply in wagon-loads at their concessional rates, which is an important consideration for developing distant markets to be served by rail transport."

....

"Although they are not comparable to WIMCO in having a country-wide distributive organization, these units evinced till recently all the symptoms of a steady and healthy development, some of them having reached the maximum limit (4000 million sticks) of Category 'B' with a reputation for their brands in far off markets. They had the resources to support this progressive development and a few of them have represented that with an improve-

ment of the climate of the trade which has been completely vitiated by the slab system of excise duties (*see* paragraph II) and given necessary facilities they would be able to re-establish the markets they had assiduously built up and even initiate a scheme of gradual mechanisation of important processes in their factories for the betterment of the quality of their products. In the present context, it is worth taking note of the fact that the credit for an expanding market for matches produced in the non-mechanised sector is attributable largely to the sales endeavours of factories which had grown to be 'B' class units that had necessary resources for the purpose and were able to maintain quality."

....

"In contrast to the 'B' class units, the selling system of those in category 'C' betokens a position of serious weakness. Except the 'C' class units which have been brought into existence by fragmentation of bigger units and still operate under the protecting wing of the sponsor (*see* paragraph 11), the new-comers in this class who have no tradition, function mostly with meagre financial resources and have no comparable advantage. Unable to sell their output in wagon-loads they are compelled to dispose of it to local financing-*cum*-trading agencies at rock bottom prices dictated by the latter for what has now come to be called consignments of "Assorted labels". This, in effect, involves a complete surrender by the 'C' class producers the benefit of differential excise rebate allowed to them to the detriment of others as well. The low purchase prices of the goods enable such agencies to send consignments of mixed brands to distant places in wagon-loads and find a market by offering to the wholesalers there extremely competitive rates *vis-a-vis* the usual rates charged by 'B' class units, the retail selling prices being the same for both. Our examination of the problem of the small scale units in category 'C' indicates that basically their problem is not different from other small industries suffering similar exploitation by middlemen. As in other cases they can best be extricated from the grip of the middleman by the establishment of suitable sales co-operatives. We draw the attention of the State Governments to this problem for initiating necessary measures for the purpose particularly of the Government of Madras, as the concentration of such units is in that State, where the problem presents itself in the most acute form, but offers favourable prospects for the establishment of several full-fledged sales co-operatives with adequate membership."

....

"There is sufficient evidence to indicate that the effects have been quite widespread and recourse has been taken to fragmentation on a fairly extensive scale."

....

"The Sivakasi Chamber has stated as follows :

"In the face of such unhealthy competition from 'C' factories and the disadvantages over 'A', the 'B' is unable to market its production resulting in heavy accumulation of stocks. It is now felt by 'B' class factories that there is no other salvation for them except to convert 'B' into 'C' class factories in benami names, as few have since done. It may be pointed out that 16 long established 'B' factories have reduced themselves to 'C' class with effect from 1st April, 1963, in this Division alone in addition to the numerous factories who have already

converted from 'B' to 'C' as regards similar fragmentation of the larger units in category 'C'. Almost identical views have been expressed by the Tirunelvely Match Association, representing 150 'C' class match factories, in the following words: 'In view of the vast difference of excise duty between 1st and 3rd slab of excise duty in 'C' class there is a tendency and practice among the manufacturers to work in the first slab only and to stop therewith.'

In this way starting of small new units with the motive to enjoy rebate in the first slab of excise duty has become common and this has clearly resulted in loss of revenue, as well as working of units in less than the permitted capacity. It has been brought to our notice that the situation has deteriorated to such an extent as a result of the slab system that some erstwhile 'B' units have suspended their manufacturing activities altogether and instead found it more profitable to patronise a number of newly established 'C' class units. Their taking over the products of the latter in their new role as a trading-*cum*-financing agency has been facilitated by their established market connections and resourcefulness. Instances of 'B' category units owned by individual proprietors drowngrading themselves into category 'C' and having a number of 'C' class units set up in the name of near relations have also been noticed by us in the course of our visits to factories in the Sivakasi/Sattur/Kovilpatti area. The allegations about extensive fragmentation were not denied by anybody at the public inquiry."

....

"The volume of evidence, both direct and indirect, that we have received in this connection fully testifies to the fact that large-scale fragmentation of 'B' and 'C' class units has taken place directly as a result of the slab system — all motivated by the attraction offered by the large duty differential of 65 nP. for the lowest slab rate under category 'C'."

....

"From the evidence received by us 'B' and 'C' class units have to offer their match boxes generally at a discount of Rs. 2 to Rs. 3 per bundle of 5 gross boxes, *i.e.* at about 40 to 60 nP. per gross less than the price charged by WIMCO. While the quality of matches produced by 'B' class manufacturers has the reputation of being generally good and comparable to WIMCO's matches, the 'C' class units do not have such reputation in the market. The 'C' class manufacturers are handicapped by a further disadvantage on account of the lower scale of their production, inasmuch as they cannot usually offer a wagon-load of matches at a time for despatch to the upcountry markets for sale and have generally to bear the Central Sales-tax. After carefully considering all aspects of the case including estimates of costs of the manufacturers, we are of opinion that a differential of 20 nP. in the rates of excise duty per gross of match boxes between 'A' and 'B' class units and a differential of 30 nP. between 'B' and 'C' class manufacturers would be quite adequate to safeguard their respective interests. On similar considerations a differential of 35 nP. between 'C' and 'D' class units would also be justified. For reasons stated in paragraph 11 and as stressed therein we are definitely against continuance of the slabs introduced in classes 'A', 'B' and 'C' carrying differential rates of excise duty, which have entailed serious repercussions on the entire industry. We, therefore, recommend the following scales of excise duty to be levied for the four classes respectively :

For 'A' class	..	Rs. 4.60 per gross boxes
For 'B' class	..	Rs. 4.40 per gross boxes
For 'C' class	..	Rs. 4.10 per gross boxes
For 'D' class	..	Rs. 3.75 per gross boxes."

5. The Tariff Commission recommended, the abolition of sub-classification for the purposes of excise duty and suggested separate scales of excise duty to be levied for the four classes of units, namely ,'A', 'B', 'C' and 'D'. Based on these recommendations, the slab system of excise duty was abandoned by Government and the category-wise rate was adopted. The impact on production of the differential duty scheme was a process of splintering of the 'B' group to inhale the advantages offered to the 'C' group resulting in a reduction in total production, thanks to the thinning tendency in the 'B' group. Indeed, the fiscal misdirection, by showing concessional rates to the 'C' category as against 'B' category, generated *pseudo* 'C' category producers from out of the erstwhile 'B' category so that the *bona fide* small-scale manufacturers falling in the 'C' category were flooded out. Moreover, the genuine 'C' category manufacturers were exploited by the middlemen who snapped up the margin of tax concession for themselves, defeating the object of the concessional duty for the small producer. This dilemma induced Government to revise its fiscal thinking and led to the impugned notification which withdrew the tax concession to the 'C' category and equated it with the 'B' category.

6. Section 3 of the Central Excise and Salt Act, 1944, empowers the levy and collection of duties on goods produced or manufactured in the State, the rate being set forth in the First Schedule to the Act. Item 38 in the first schedule relates to matches. Section 37 contains the rule-making power and section 37 (1) confers power on the Central Government by rules to exempt any goods from the whole or any part of the duty imposed by the Act. Under this power the Central Government issued a notification adopting a "classification" approach for extending concessional rates. Originally, a broad classification was made as between matches manufactured by use of machinery and those by other means. Among the second category a sub classification was made as 'B', 'C' and 'D' for the purposes of concessional rates. In 1966, a uniform levy of Rs. 4.15 per gross of match boxes was made doing away with 'B' to 'D' classes. In 1967, this position was revised by notification No. 162 of 1967 which is challenged before us. It reads :

"In exercise of the powers conferred by sub-rule (1) of Rule 6 of the Central Excise Rules, 1955, and in supersession of the Notification of the Government of India in the Ministry of Finance (Department of Revenue and Insurance) No. 115 of 1967, Central Excise, dated the 8th June, 1967, the Central Government hereby exempts matches specified in column (2) of the Table below, falling "under Item No. 38 of the First Schedule to the Central Excises and Salt Act, 1944 (I of 1944) and cleared by any manufacturer for home consumption, from so much of the duty of excise leviable thereon as is in excess of the rate specified in the corresponding entry in column (3) of the said table :

Category	*Description of matches.*	*Rate (Rs. per gross of boxes 50s matches each)*
1.	Matches in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power ..	4.60
2.	Matches in or in relation to the manufacture of which no process is ordinarily carried on with the aid of power ..	4.30

Provided that —

(1) Matches referred to in category 2 and cleared for home consumption during the financial year from a factory from which the total clearance of matches during that year is not, as per declaration made by the manufacturer under this notification, estimated to exceed 75 million matches, shall be allowed to be cleared at the rate of Rs. 3.75 per gross of boxes 50 matches each, upto 75 million matches and the quantity of matches, if any, cleared in excess, and upto 100 million matches shall be allowed to be cleared at the rate of Rs. 4.30 per gross of boxes of 50 matches each ; and if the clearance in such factory exceeds 100 million matches during the financial year, the manufacturer shall be required to pay at the rate of Rs. 4.30 per gross of boxes of 50 matches each, on the entire quantity cleared during the financial year ...."

7. The upshot of this system of duty is that 'B' and 'C' categories of old will now be treated equally and the grievance of the petitioners, who are 'C' category manufacturers is that clubbing them together with the far stronger 'B' type manufacturers is virtually condemning them to gradual extinction. Treating unequals as equals and compelling both to bear equal burdens is to show the 'C' type manufacturers the way out. It is urged that the test of capacity of each group in the industry to bear the levy, recognised in the past and approved in the Tariff Commission Report, is given the go-bye now.

8. The contention, in reply, by the State is that at present the classification of the manufacturers is based on the use of power which in turn has a rational relation to the techniques and processes of production and their ability to bear the burden of the levy. It is further argued that the Government did give effect to the recommendations of the Tariff Commission regarding the four-fold classification but, finding certain evils developing, the Central Excise Reorganisation Committee went into the subject and suggested methods to re-orient the scale and scope of excise duty. This Committee's report led to the current notification and the dichotomy between mechanised and non-mechanised industry proceeds on a rational differentia which has a substantial relation to the legislative end.

9. There is no doubt that in the past among the non-mechanised manufacturers of matches a further classification based on viability had been made. It is also true that the financial resources, the capacity to command a market on their own without depending on intermediaries, etc., marked off the 'B' category from

the 'C' category. But then experience gathered subsequently disclosed certain evils which the State took note of and endeavoured to set right. Ultimately, the present notification was issued obliterating the distinction which gave a concessional edge to the 'C' group over the 'B' group.

10. The learned Counsel for the appellants persuasively pleaded that this unsocialistic step has left the small producers like his clients in the cold and virtually compelled them to retire from the industry. May be, there is force in this grievance. Instead of protecting the tiny manufacturer from the injurious intermediary and inhibiting the larger producer from resorting to the device of self-division and other make-believe tactics, the State has resorted to a policy of equal levy from both which, according to the Counsel, hits the poor and helps the better-off. This is a criticism of legislative judgment, not a ground of judicial review.

11. We agree that bare equality of treatment regardless of the inequality of realities is neither justice nor homage to the constitutional principle. Anatole France's cynical statement comes to our mind in this context :

> "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

12. The forensic focus turns on unconstitutional non-classification of the 'B' and 'C' categories and the vice of lugging all non-mechanised producers together into one mass. The Court is being invited to compel the legislative and executive wings to classify, but we feel that from the judicial inspection tower the Court may only search for arbitrary and irrational classification and its obverse, namely capricious uniformity of treatment where a crying dissimilarity exists in reality.

13. Right at the threshold we must warn ourselves of the limitations of judicial power in this jurisdiction. Mr. Justice Stone of the Supreme Court of the United States has delineated these limitations in *United States* v. *Butler*[1] American Constitutional Law — third edn. by Tresolini and Shapiro thus :

> "The power of Courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that Courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the Courts but to the ballot and to the processes of democratic Government."

14. In short, unconstitutionality and not unwisdom of a legislation is the narrow area of judicial review. In the present case unconstitutionality is alleged as springing from lugging together two dissimilar categories of match manufacturers into one compartment for like treatment.

15. Certain principles which bear upon classification may be mentioned here. It is true that a State may classify persons and objects for the purpose of legislation and pass laws for the purpose of obtaining revenue of other objects. Every differentiation is not a discrimination. But classification can be sustained only if it is founded on pertinent and real differences as distinguished from irrelevant and artificial ones. The constitutional standard by which the sufficiency of the differentia which form a valid basis for classification may be measured, has been repeatedly

1. (1936) 297 U.S. 1 : 56 Sup. Ct. 312 : 80 Law Ed. 477.

stated by the Courts. If it rests on a difference which bears a fair and just relation to the object for which it is proposed, it is constitutional. To put it differently, the means must have nexus with the ends. Even so, a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. In this imperfect world perfection even in grouping is an ambition hardly ever accomplished. In this context, we have to remember the relationship between the legislative and judicial departments of Government in the determination of the validity of classification. Of course, in the last analysis Courts possess the power to pronounce on the constitutionality of the acts of the other branches whether a classification is based upon substantial differences or is arbitrary, fanciful and consequently illegal. At the same time, the question of classification is primarily for legislative judgment and ordinarily does not become a judicial question. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judicature cannot rush in where even the legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation.

16. One facet of the equal protection clause, upheld by the Indian Courts and relevant to the present case, is that while similar things must be treated similarly, dissimilar things should not be treated similarly. There can be hostile discrimination while maintaining a facade of equality.

Procrustean cruelty cannot be equated with guarantee of constitutional equality, and we have to examine whether such is the lot of the appellants.

17. This Court has in several rulings highlighted this sensitive underside of equal protection. Indeed, the complaint of the petitioners is that by abolition of the difference in fiscal burden between categories 'B' and 'C' an insidious subversion of equal treatment has been affected.

18. Another proposition which is equally settled is that merely because there is room for classification it does not follow that legislation without classification is always unconstitutional. The Court cannot strike down a law because it has not made the classification which commends to the Court as proper. Nor can the legislative power be said to have been unconstitutionally exercised because within the class a sub-classification was reasonable but has not been made.

19. It is well established that the modern State, in exercising its sovereign power of taxation, has to deal with complex factors relating to the objects to be taxed, the quantum to be levied, the conditions subject to which the levy has to be made, the social and economic policies which the tax is designed to subserve, and what not. In the famous words of Holmes, J., in *Bain Peanut Co.* v. *Pinson*[1]:

> "We must remember that the machinery of Government would not work if it were not allowed a little play in its joints."

20. In the present case, a pertinent principle of differentiation, which is visibly linked to productive process, has been adopted in the broad classification of power users and manual manufacturers. It is irrational to castigate this basis as unreal. Indeed, the soundness of this distinction is not denied. The challenge is founded on the failure to mini-classify between large and small sections of manual match manufacturers. But ours is not

1. (1930) 282 US 499, 501.

to reason why, that being a policy decision of Government dependent on pragmatic wisdom playing on imponderable forces at work. Our jurisdiction halts where the constitutional touchstone of a rational differentia having a just relation to the legislative end to revenue raising is satisfied. Gratuitous judicial advice on the socialistic direction of fiscal policy is *de trop*. We desist from that enterprise and leave the petitioners and men of his ilk to seek other democratic remedies in that behalf, it being beyond our area normally to demolish the tax structure because micro-classification among a large group has not been done by the State. Absolute justice to every producer is a self-defeating adventure for any administration and general direction, not minute classification, is all that can be attempted. For these reasons we find ourselves in agreement with the High Court in its refusal so strike down the notification under section 3 of the Central Excises and Salt Act, 1944.

21. Before concluding we may make a passing reference to the few decisions cited by appellants' Counsel. In *K. T. Moopil Nair* v. *State of Kerala*[1], Sinha, C.J., emphasised that Article 14 may be violated even though the law may, on the face, be equal if in substance unequal things are treated equally. In *State of Kerala* v. *Haji K. Haji Kutty Naha*[2], Shah, J., observed:

> "Where objects, persons or transactions essentially dissimilar are treated by the imposition of a uniform tax, discrimination may result, for, in our view, refusal to make a rational classification may itself in some cases operate as denial of equality."

1. (1961) 3 S.C.R. 77 : (1961) 2 S.C.J. 269 : A.I.R. 1961 S.C. 552.
2. (1969) 1 S.C.J. 691 : (1969) 1 S.C.R. 645 : A.I.R. 1969 S.C. 378.

A similar view has been taken in *Khandige Sham Bhat* v. *The Agricultural Income-tax Officer*[1].

22. It is sound law that refusal to make rational classification where grossly dissimilar subjects are treated by the law violates the mandate of Article 14. Even so, where the limited classification adopted in the present case is based upon a relevant differentia which has a nexus to the legislative end of taxation, the Court cannot strike down the law on the score that there is room for further classification. Refusal to classify is one thing and it bears on constitutionality; not launching on micro-classification to work out perfect justice is left to executive expediency and legislative judgment and not for forensic wisdom.

> "The relationship between the legislative and judicial departments of Government in the determination of the validity of classification is well settled .... the authorities state with unanimity that the question of classification is primarily for the legislature and that it can never become a judicial question except for the purpose of determining, in any given situation whether the legislative action is clearly unreasonable. The legislative classification is subject to judicial revision only to the extent of seeing that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition."

(American Jurisprudence : 2nd Vol. 16, para. 496.)

> "In a classification for Governmental purposes there cannot be an exact exclusion or inclusion of persons and things. The constitutional command

1. (1963) 1 S.C.J. 140 : 48 I.T.R. (S.C.) 29 : (1963) 3 S.C.R. 809, 817: A.I.R. 1963 S.C. 511.

for a State to afford equal protection of the law sets a goal not attainable by the invention and application of a precise formula. Classification in law, as in the other departments of knowledge or practice, is the grouping of things in speculation or practice because they agree with one another in certain particulars, and differ from other things in those particulars. It is almost impossible in some matters to foresee and provide for every imaginable and exceptional case, and a legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. Hence, a large latitude is allowed to the States for classification upon any reasonable basis, and what is reasonable is a question of practical details into which fiction cannot enter." (*ibid* : para. 504).

23. We have said enough to delineate the finer frontiers of the jurisdiction of the Court and the legislature. Having sensitive regard to the obligation of the State to bring the law, including the tax law, into pulsing relationship with life, including the life of the country's economy, we see nothing so grossly unfair as to attract the lethal power of the Court to strike down the notification under challenge.

24. We dismiss the appeals but in the circumstances without costs to the respondents.

V.K. *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*P. Jaganmohan Reddy and P. K. Goswami, JJ.*

M. C. Chockalingam and others .. *Appellants**

v.

V. Manickavasagam and others .. *Respondents.*

(A) *Madras Cinemas (Regulation) Rules (1957), rule 13—Renewal of licence—Applicability of rule 13—Tenant in possession after termination of lease—If in 'lawful possession'—If entitled to renewal of licence under rule 13—Juridical possession and lawful possession—Distinction.*

(B) *Specific Relief Act (XLVII of 1963), section 6—Scope.*

Rule 13 of the Madras Cinemas (Regulation) Rules, 1957, is clearly applicable to grant as well as to renewal of a licence. [*Para.* 17.]

In the context of rule 13 a tenant on the expiry of the lease cannot be said to continue in 'lawful possession' of the property against the wishes of the landlord if such a possession is not otherwise statutorily protected under the law against even lawful eviction through Court process, such as under the Rent Control Act. Section 6 of the Specific Relief Act, 1963, does not offer such protection, but only forbids forcible dispossession, even with the best of title. [*Para.* 14.]

All that section 6 of the Specific Relie Act, 1963 provides is that a person, even if he is a landlord cannot take the law into his own hands and forcibly evict a tenant after the expiry of the lease. Section 6 frowns upon forcible dispossession without recourse to law but does not at the same time declare that the possession of the evicted person is a lawful possession. [*Para.* 13.]

The fact that after expiry of the lease the tenant will be able to continue in possession of the property by resisting a suit for eviction, does not establish a case in

* C. A. No. 1229 of 1973. 31st October, 1973.

law to answer the requirement of lawful possession of the property within the meaning of rule 13. Lawful possession cannot be established without the concomitant existence of a lawful relationship between the landlord and the tenant. This relationship cannot be established against the consent of the landlord unless, however, in view of a special law, his consent becomes irrelevant. Lawful possession is not litigious possession and must have some foundation in a legal right to possess the property which cannot be equated with a temporary right to enforce recovery of the property in case a pe son is wrongfully or forcibly dispossessed from it. Juridical possession is possession protected by law against wrongful dispossession but cannot *per se* always be equated with lawful possession. [*Para.* 15.]

Hence the possession of the respondents in the instant case after the expiry of the lease was not lawful possession within the meaning of rule 13 entitling him to a renewal of the licence under rule 13. [*Para.* 16.]

Cases referred to:—

Lalu Yeshwant Singh v. *Rao Jagdish Singh*, (1968) 2 S.C.J. 244: (1968) 2 S.C.R. 203: A.I R 1968 S.C. 620 ; *K. K. Verma* v. *Naraindas C. Malkani*, I.L.R. (1954) Bom. 950 : A.I.R. 1954 Bom. 358 ; *Yar Mohammad* v. *Lakshmi Das*, I.L.R. (1958) 2 All. 394 : A.I.R. 1959 All. 1 (F.B.); *Midnapur Zamindary Co. Ltd.* v. *Naresh Narayan Roy*, 47 M.L.J. 23: 80 I C. 827: 51 I.A. 293 : A.I.R. 1924 P.C. 144 : *C. Bhavarlal* v. *Mallay Gounder*, (1970) 1 M.L.J. 236.

The Judgment of the Court was delivered by

Goswami, J.—This appeal by Special Leave is directed against the judgment of the Madras High Court by which it set aside the judgment of a single Judge of that Court in a writ proceeding under Article 226 of the Constitution. The facts may briefly be stated.

2. The first respondent obtained a registered lease of a cinema theatre known as Kapali Talkies, Madras, for a period of three years from 19th August, 1969. The lease was a composite lease consisting of the land, buildings and the cinematographic equipment in it. The monthly rental was Rs. 9,125. Among other terms, the lease was to expire on 18th August, 1972. It is not necessary for our purpose to refer to the condition of an earlier termination of the lease under certain circumstances. The lessors (the appellants herein) are the sole and absolute owners of the Kapali Talkies, Madras-28, described in Schedule 'A' to the lease.

3. It may be appropriate to extract some material portions of the lease executed between the parties, which run as follows :

Schedule 'A' describes the land, buildings, other constructions and immovable things and properties therein with all the appurtenances known as the cinema theatre, Kapali Talkies, situated in No. 52, Ramakrishna Mutt Road, Raja Annamalaipuram, Madras-28, excluding the room in front side of the main building of the cinema theatre, which is retained by the lessors exclusively for their occupation and use. The other leased properties are mentioned in Schedules 'B', 'C' and 'D' to the lease. Schedule 'B' describes the projectors and machineries installed in the building. Schedule 'C' describes the seats and furniture. Schedule 'D' describes the fixtures and fittings and installations, equipments and other articles and things and materials. Having so described the leased properties:

> "the lessors hereby grant unto the lessee .... by way of lease the land and buildings with other immovable properties and things therein known as Kapali Talkies, Madras-28 .... more particularly described in Schedule 'A' hereunder that all the projectors, machineries, seats, furniture and other articles and things stated above and more fully described in Schedules 'B', 'C' and 'D' hereunder .... in a composite manner as a cinema theatre functionable, and known as Kapali Talkies, Madras-28, abovementioned with the rights to exhibit films as cinema shows therein .... for a specific use of the same as cinema theatre to exhibit films as cinema shows only, for a speci-

fic period of three years only commencing from 19th August, 1969 and ending with 18th August, 1972 on a monthly rent of Rs. 9,125 payable by the lessee to the lessors for and throughout the said period of three years .... subject to the covenants and terms and conditions hereinafter contained."

" Clause 6. The sole feature of the lease is sheer exhibition of films as cinema shows at the said cinema theatre, Kapali Talkies, Madras-28 and not for utilising the said cinema theatre and other things taken on lease for any other purpose of any kind other than the exhibition of films as cinema shows. The lessee shall strictly observe this."

" *Clause* 9. In all transactions, advertisements and banners the lessee shall style himself as 'Lessee of Kapali Talkies, Madras-28' and on no account the name 'Kapali Talkies' shall be changed."

" *Clause* 27. The lessee shall make his own arrangements at his own costs and responsibilities for the running of the said cinema theatre, such as taking out the licence, permits, certificates, and other necessary things .... "

" *Clause* 35. The lessee shall, on the termination of the lease or on an earlier termination of the lease at any earlier period under any circumstances return back to the lessors forthwith the properties taken on lease in good, proper and functionable conditions and state in which he has received them from the lessors."

4. The above lease admittedly expired on 18th August, 1972. There was a notice, dated 15th May, 1972, to the first respondent to deliver back possession on the expiry of the lease. On 17th June, 1972, the first respondent made an application to the Commissioner of Police (briefly the Commissioner) which is admittedly the competent authority under the Madras Cinemas (Regulation) Act, 1955 (Act No. IX of 1955) (briefly the Act) to renew the licence. On 12th July, 1972, the appellants also made an application to the Commissioner to grant the licence to their favour. In August, 1972, the Commissioner by a common order in both the petitions renewed the licence of the respondent and rejected the application of the appellants. On 14th August, 1972, the appellants preferred an appeal to the Board of Revenue which set aside the order of the Commissioner on 16th September, 1972. The first respondent then lodged an application under Article 226 of the Constitution in the Madras High Court on 18th September, 1972 and the learned single Judge dismissed the same on 8th February, 1973. The respondent thereafter preferred a Letters Patent Appeal to the Division Bench which by the impugned judgment allowed the same on 4th July, 1973. The High Court refused to grant leave to appeal to this Court and hence this appeal by Special Leave.

5. The Board of Revenue (briefly the Board) accepted the appellants' contention that the respondent was not in lawful possession of the leased property. The learned single Judge of the High Court also held to the same effect while interpreting rule 13 of the Madras Cinemas (Regulation) Rules, 1957 (briefly the Rules) made under the Act. The Division Bench of the High Court, however, relying upon a decision of this Court in *Lalu Yeshwant Singh* v. *Rao Jagdish Singh*[1], held that the respondent's possession after expiry of the lease was lawful possession within the meaning of rule 13 of the Rules. The learned single Judge repelled a contention of the respondents to the effect that the appellants could not be said to be aggrieved persons under section 5 (7) of the Act, which was amended by the Madras Act IV of 1961. This does not appear to have been pressed by the respondents before the Division Bench.

6. Mr. Gupte, learned Counsel for the appellants, submits that the High Court is wrong in interpreting Rule 13 of the Rules in order to hold that the respondents are in lawful possession of the leased properties after expiry of the lease. He further submits that at any rate the High Court could not interfere with the order of the Board under Article 226 of the Constitution on the principles laid down by this Court in such matters.

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1. (1968) 2 S.C.J. 244 ; (1968) 2 S.C.R. 203: A.I.R. 1968 S.C. 620.

7. Mr. Setalvad on behalf of the respondents, on the other hand, submits firstly that rule 13 does not apply to a case of renewal of licence; secondly, that the lessor is not a person aggrieved under section 5 (7) of the Act and is, therefore, not competent to appeal to the Board under that section, and thirdly, that rule 13 which refers to the 'lawful possession' is only juridical possession, a kind of possession which is protected by law such as section 9 (old), section 6 (new) of the Specific Relief Act and, therefore, the High Court is right in holding that the respondents were in lawful possession of the property after the expiry of the lease and as such entitled to renewal of the licence. It is lastly contended that the High Court on the writ side under Article 226 of the Constitution has jurisdiction to quash an order of the Board if there is a manifest error of law in interpretation of rule 13 of the Rules.

8. On the question whether and in what circumstances possession is lawful, he relies upon the decision of this Court in *Lalu Yeshwant Singh's case*[1] and submits that this Court has approved of the decision of the Bombay High Court in *K. K. Verma* v. *Naraindas C. Malkani*[2], wherein it was observed as follows :

> "Under the Indian law the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy his possession is juridical and that possession is protected by statute. Under section 9 of the Specific Relief Act a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law......"

He further points out that this Court in the said case also approved of the decision of the Full Bench of the Allahabad High Court in *Yar Mohammad* v. *Lakshmi Das*[3], wherein it was observed :

> "No question of title either of the plaintiff or of the defendant can be raised or gone into in that case (under section 9 of the Specific Relief Act). The Plaintiff will be entitled to succeed without proving any title on which he can fall back upon and the defendant cannot succeed even though he may be in a position to establish the best of all titles. The restoration of possession in such a suit is, however, always subject to a regular title suit and the person who has the real title or even the better title cannot, therefore, be prejudiced in any way by a decree in such a suit. It will always be open to him to establish his title in a regular suit and to recover back possession."

He further draws our attention that in *Lallu Yeshwant Singh's case*[1], this Court further approved of the law laid down by the Privy Council in *Midnapur Zamindary Co. Ltd.* v. *Naresh Narayan Roy*[2], quoted in, *Lallu Yeshwant Singh's case*[1] to the following effect :

> "In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court."

Mr. Setalvad, therefore, submits that in view of the above decisions, the decision of the Madras High Court is correct.

9. To take the second submission of Mr. Setalvad first, it is sufficient to state that the appellants were themselves applicants before the Commissioner for grant of a licence under the Act and the respondents were praying to the Commissioner for renewing the same licence. It is, therefore, clear that the appellants are aggrieved by the order of the Commissioner in granting renewal to the respondents and refusing their prayer for the licence. It is, therefore, not necessary to deal with the several sections and the rules which are relied upon by Mr. Setalvad to support his contention that the appellants are not aggrieved within the meaning of section 5 (7) of the Act. The second submission of the learned Counsel, therefore, fails.

1. (1968) 2 S.C.R. 203: (1968) 2 S.C.J. 244 : A.I.R. 1968 S.C. 620.
2. I.L.R. 1954 Bom. 950 at 957 ; A.I.R. 1954 Bom. 358.
3. (1958) I.L.R. 2 All. 394 at 404 ; A.I.R. 1959 All. 1 (F.B.).

1. (1968) 2 S.C.J. 244: (1968) 2 S.C.R. 203: A.I.R. 1968 S.C. 620.
2. 47 M.L.J. 23: 80 I.C. 827 ; 51 Ind. App. 293 at 299 : A.I.R. 1924 P.C. 144.

10. With regard to the submission on the interpretation of rule 13 we may read the same :

> " If the applicant for the licence is the owner of the site, building and equipment, he shall produce to the licensing authority the necessary records relating to his ownership and possession thereof. If he is not the owner, he shall, to the satisfaction of the licensing authority, produce documentary evidence to show that he is in lawful possession of the site, building and equipment."

The rule has got two parts. The first part deals with an applicant for the licence who is the owner of the site, building and equipment and the second part deals with an applicant who is not such an owner. In the present case, the second part of rule 13 is material since the respondent, who was the licensee, is not the owner of the site, building and equipment. This position is admitted by both the parties. It is, therefore, clear that under rule 13 the respondent is required to produce documentary evidence to show that he is in 'lawful possession' of the site, building and equipment. The only documentary evidence he showed with regard to his possession is the expired lease. Further the appellants had themselves applied for the grant of a licence and they resisted the respondent's right to possession of the property after expiry of the lease. In these circumstances, it is necessary to consider whether the High Court's view that such a possession is 'lawful possession' is correct or not.

11. We should also note here that it is admitted by both the parties that the case is not governed by the Madras Buildings (Lease and Rent Control) Act, 1960 (Madras Act XVIII of 1960) to entitle the tenant to claim statutory protection from eviction under the Act.

12. The principal question, therefore, that comes for decision in this appeal is whether a tenant, who is not a statutory tenant, is entitled to claim to be in lawful possession of the premises on determination of the tenancy, on expiry of the lease. We may quote what the Division Bench of the Madras High Court held in its own words :

> " Such possession is quite good against the entire world except the landlord himself. The landlord will be entitled to evict him by the appropriate proceedings. Until then we are of the view that the erstwhile tenant cannot be regarded as being in unlawful possession. We are inclined to think that his possession is wrongful but not unlawful. It is wrongful because the erstwhile tenant continues in possession beyond expiry of the period fixed in the lease. It is not unlawful, because the landlord cannot take the law into his own hands and evict him. He can evict him only by proper procedure and, that being the case, it cannot be said that the erstwhile tenant is in unlawful possession."

Mr. Gupte has drawn our attention to an earlier decision of the Division Bench of the same High Court in *C. Bhavarlal* v. *Malley Gounder*[1], where the High Court refused to interfere with the decision of the licensing authority, affirmed by the Board of Revenue. The High Court in that case held as follows :

> " The jurisdiction to grant or refuse renewal of a licence is entrusted to the licensing authority which is not the Court. The nature of the jurisdiction so entrusted is clearly for the licensing authority to see whether on the documentary evidence produced, he is satisfied that the applicant was in lawful possession of the site. In exercise of his jurisdiction the licensing authority looks into the matter *prima facie* and for the purpose of his being satisfied whether he, the applicant is in lawful possession. He is not called upon to decide the issue finally between the parties as in a suit. This aspect of the matter should be kept in view when it comes up in the form of a writ petition under Article 226 of the Constitution. In exercise of this power this Court will not in that background, take upon itself to investigate as to the legality of possession of the site in the hands of the applicant. All that can be looked into by this Court, as we are inclined to think, is whether the licensing authority has applied his mind to the documentary

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1. (1970) 1 M.L.J. 236.

evidence produced before him and weighed it with a view to satisfy himself as to the legality. Short of caprice, arbitrariness or *mala fides* the licensing authority would more than have done his duty if he had gone through that process. If this Court is satisfied about it, it will not further go into the rival position in regard to the legality of possession of the site which will not necessarily be the final pronouncement between the parties but leave the issue to be tried as between them in a suit in the appropriate civil Court."

13. We are concerned in this case with the concept of 'lawful possession' in the context of the Act with which we are concerned. As stated earlier, rule 13 has got two parts and we are concerned in this case with the second part. A great stress has been given by Mr. Setalvad upon the decision of the Supreme Court in *Lallu Yeshwant Singh's case*[1], where this Court considered the possession of a tenant after expiry of the lease, as in this case, as a juridical possession in the context of a provision similar to section 9 of the Specific Relief Act. He emphasises that such a juridical possession would be a lawful possession, as it is protected by law, namely, under section 6 (new) of the Specific Relief Act. Mr. Setalvad submits that since even with the best of title to the property the landlord cannot, forcibly dispossess a tenant after expiry of the lease, his possession is not only protected by law but also recognised by law and, therefore, his possession is lawful possession and the licensing authority was right in renewing the licence which the Board of Revenue had wrongly interfered with. After giving anxious consideration we are unable to accept the submission of Mr. Setalvad. All that section 6 (new) of the Specific Relief Act provides is that a person, even if he is a landlord, cannot take the law into his own hands and forcibly evict a tenant after expiry of the lease. This section has relevance only to the wrongful act of a person, if it be by the landlord, in forcibly recovering possession of the property without recourse to law. Section 6 frowns upon forcible dispossession without recourse to law but does not at the same time declare that the possession of the evicted person is a lawful possession. The question of lawful possession does not enter the issue at that stage. All that the Court is then required to consider is whether an evicted person has been wrongfully dispossessed and he has come to the Court within six months of the dispossession. The various civil rights between the landlord and the tenant will have to be adjudicated upon finally in a regular civil suit if filed. Mr. Setalvad has drawn our attention to the definition of the word 'juridical' in Black's Law Dictionary, Fourth edition, at page 990. There the definition is given as follows :

> *Juridical* : "Relating to administration of justice, or office of a judge.
>
> *Regular* : done in conformity to the laws of the country and the practice which is there observed".

Mr. Setalvad submits that possession of the licensee in this case is in conformity with the provisions of the Specific Relief Act and what is juridical is also lawful. In the same Dictionary at page 1032 the word 'lawful' is also defined as follows :

> *Lawful* : "Legal ; warranted or authorised by the law ; having the qualifications prescribed by law ; not contrary to nor forbidden by the law".

It is difficult to appreciate how possession in the instant case can be said to be "warranted or authorised by the law" as per the above definition. On the other hand, what is 'contrary to or forbidden by the law' is only the forcible dispossession of a tenant which may even engender breach of the peace. There is a very interesting discussion, about the meaning of 'lawful possession' in Part II, Chapter I of Pollock & Wright's book "An Essay on Possession in the Common Law", 1888 edition, at page 26.

According to the learned authors.

> "Legal possession, the state of being a possessor in the eye of the law ...... but it may exist ...... either with or without a rightful origin."

The illustrations given in the book at pages 27 and 28 are more interesting :

1. (1968) 2 S.C.J. 244 : (1968) 2 S.C.R. 203 : A.I.R. 1968 S.C. 620.

"A tailor sends to *J. S.*s' house a coat, which *J. S.* has ordered. *J. S.* puts on the coat, and then has both physical control and rightful possession in law. *J. S.* takes off the coat and gives it to a servant to take back to the tailor for some alterations. Now the servant has physical control (in this connexion generally called 'custody' by our authorities) and *J. S.* still has the possession in law.

While the servant is going on his errand, *Z* assaults him and robs him of the coat. *Z* is not only physically master of the coat, but, so soon as he has complete control of it, he has possession in law, though a wrongful possession..........."

'Lawful possession' means a legal possession which is also rightful or at least excusable; this may be consistent with a superior right to possess in some other person".

The learned authors have further put in a word of caution observing:

"The whole terminology of the subject, however, is still very loose and unsettled in the books, and the reader cannot be too strongly warned that careful attention must in every case be paid to the context."

14. Mr. Gupte strenuously submits that 'lawful possession' cannot be divorced from an affirmative, positive legal right to possess the property and since the lease had expired by efflux of time the tenant in this case had no legal right to continue in possession. In the context of Rule 13, we are clearly of opinion that a tenant on the expiry of the lease cannot be said to continue in 'lawful possession' of the property against the wishes of the landlord if such a possession is not otherwise statutorily protected under the law against even lawful eviction through Court process, such as under the Rent Control Act. Section 6 of the Specific Relief Act does not offer such protection, but only, as stated earlier, forbids forcible dispossession, even with the best of title.

15. Turning to Rule 13, even in the first part if the applicant for the licence is the owner of the property he has to produce before the licensing authority the necessary records not only relating to his ownership but also regarding his possession. It is implicit, that the owner having a title of the property, if he can satisfy the licensing authority with regard to his possession also, will indeed be in 'lawful possession', although the word 'lawful' is not used in the first part. It is in that context that the word 'possession' is even not necessary to be qualified by 'lawful' in the first part of Rule 13. If, however, the applicant for the licence is not the owner, there is no question of his showing title to the property and the only requirement of the law is to produce to the satisfaction of the authority documentary evidence with regard to his lawful possession of the property. The word 'lawful', therefore, naturally assumes significance in the second part while it was not even necessary in the first part. The fact that after expiry of the lease the tenant will be able to continue in possession of the property by resisting a suit for eviction, does not establish a case in law to answer the requirement of lawful possession of the property within the meaning of rule 13. Lawful possession cannot be established without the concomitant existence of a lawful relationship between the landlord and the tenant. This relationship cannot be established against the consent of the landlord unless, however, in view of a special law, his consent becomes irrelevant. Lawful possession is not litigious possession and must have some foundation in a legal right to possess the property which cannot be equated with a temporary right to enforce recovery of the property in case a person is wrongfully or forcibly dispossessed from it. This Court in *Lallu Yeshwant Singh's case*[1] had not to consider whether juridical possession in that case was also lawful possession. We are clearly of opinion that juridical possession is possession protected by law against wrongful dispossession but cannot *per se* always be equated with lawful possession.

16. Law in general prescribes and insists upon a specified conduct in human relationship or even otherwise. Within the limits of the law, Courts strive to take note of the moral fabric of the law. In

1. (1968) 2 S.C.J. 244 : (1968) 2 S.C.R. 203 : A.I.R. 1968 S.C. 620.

the instant case, under the terms of the lease, the property had to be handed over to the lessor. Besides under section 108 (*q*) of the Transfer of Property Act, on the determination of the lease, the lessee is bound to put the lessor into possession of the property. Since the landlord has not assented to the lessee's continuance in possession of the property, the lessee will be liable to mesne profits which can again be recovered only in terms of his wrongful possession. Under section 5 (1) of the Act, the licensing authority in deciding whether to grant or refuse a licence has regard, amongst others, to the interest of the public generally. Public interest is, therefore, also involved in granting or refusing a licence. That being the position, the expression 'lawful possession' in rule 13 assumes a peculiar significance of its own in the context of the provisions of the Act. Hence in any view of the matter possession of the respondents on the expiry of the lease is not lawful possession with the meaning of Rule 13. The High Court is, therefore, not correct in its interpretation of Rule 13. The Board of Revenue in appeal was, on the other hand, right in interfering with the order of the licensing authority and the learned single Judge of the High Court rightly refused to interfere with the order of the Board under Article 226 of the Constitution.

17. We are also unable to accept the submission of Mr. Setalvad that the case of renewal of a licence of this type is different from that of a grant. Rule 13 finds place in Part I-A of the Rules with the title 'General'. Under section 5 (2) (*a*) of the Act, the licensing authority shall not grant a licence unless it is satisfied that the rules made under this Act have been substantially complied with We, therefore, do not find any justification in making a distinction between grant and renewal of a licence under the provisions of the Act read with the Rules. Rule 13 is, therefore, clearly applicable to grant as well as to renewal of a licence.

18. With regard to the last submission of Mr. Setalvad, in our view, there is no manifest error of law in the order of the Board and there was no scope for interference by the High Court with the order under Article 226 of the Constitution.

19. In the result the decision of the Division Bench of the High Court is set aside and the application under Article 226 of the Constitution in the High Court stands dismissed. The appeal is allowed with costs.

V.K. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*A. Alagiriswami, I. D. Dua and C. A. Vaidialingam, JJ.*

Rosy Jacob .. *Appellant* *

v.

Jacob A. Chakramakkal .. *Respondent.*

(A) *Constitution of India* (1950), *Article* 136—*Revocation of special leave to appeal on the ground of misrepresentation—When called for.*

The Supreme Court can revoke Special Leave to appeal when it transpires that Special Leave had been secured by deliberate misrepresentation of a material point having a bearing on the question of granting such leave. The discretionary power vested in the Supreme Court under Article 136 of the Constitution is in the nature of a special residuary power exercisable in its judicial discretion outside the purview of ordinary law in cases where the needs of justice demand interference. Being a discretionary power intended only to promote the cause of justice when there is no other adequate remedy the Court expects those seeking resort to this reserve of constitutional power for securing justice to be absolutely fair and frank in correctly stating the relevant facts and circumstances of the case. [*Para.* 9.]

* C.As. Nos. 1295 and 1296 of 1972.
5th April, 1973.

(B) *Guardians and Wards Act (VIII of 1890), section 25 read with section 19—Scope and object of—When attracted—Proper construction—Order under, for custody of minor children—Controlling consideration—Father's right to custody—Father not found unfit to be guardian—If has an indefeasible right to custody.*

Section 25 of the Guardians and Wards Act is attracted only if a ward leaves or is removed from the custody of a guardian of his person and the Court is empowered to make an order for the return of the ward to his guardian if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian. The use of the word 'ward' and 'guardian' leave little doubt that it is the guardian who, having the care of the person of the ward, has been deprived of the same and is in the capacity of guardian entitled to the custody of such ward, that can seek the assistance of the Court for the return of the ward to his custody. The guardian contemplated by this section includes every kind of guardian known to law. [*Para.* 13.]

Section 25 contemplates not only actual physical custody but also constructive custody of the guardian. The object and purpose of this provision being *ex facie* to ensure the welfare of the minor ward, which necessarily involves due protection of the right of the guardian to properly look after the ward's health, maintenance and education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian of necessary assistance from the Court in effectively discharging his duties and obligations towards the ward so as to promote the latter's welfare. [*Para.* 14.]

If the Court under the Divorce Act cannot make any order with respect to the children because they had attained majority under that Act and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of the children under section 19 during the father's lifetime, then the only provision to which the father can have resort for his children's custody is section 25. [*Para.* 14.]

But, whether the prayer for custody of the minor children be considered under the Guardians and Wards Act or under the Divorce Act, the controlling consideration is the welfare of the children concerned. The discretion vested in the Court, as is the case with all judicial discretion, should be exercised judiciously in the background of all the relevant facts and circumstances. [*Para.* 14.]

The contention that if the father is not unfit to be the guardian then the question of the welfare of the children does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading. There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then he cannot claim an indefeasible right to their custody under section 25 merely because there is no defect in his personal character and he has attachment for his children. In case of a dispute between the father and the mother, the Court is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of the respective parents over them. [*Para.* 14.]

(C) *Guardians and Wards Act (VIII of 1890), section 25—Divorce Act (IV of*

1869), *sections* 41 *and* 42—*Evidence Act* (*I of* 1872), *section* 115—*Estoppel*—*Orders relating to custody of minors based on consent of parties*—*If can be varied by Court.*

All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. Orders relating to custody of wards even when based on consent are liable to be varied by the Court if the welfare of the wards demands variation. No question of estoppel arises in such a case. [*Para.* 17.]

Case referred to:—

Jacob A. Chakramakkal v. *Mrs. Rosy J. Chakramakkal*, (1972) 2 M.L.J. 520.

The Judgment of the Court was delivered by

Dua, J.—The real controversy in these two appeals by Special Leave preferred by the wife against her husband, lies in a narrow compass. These appeals are directed against the judgment and order of a Division Bench of the Madras High Court allowing the appeals by the husband and dismissing the cross-objections by the wife from the judgment and order of a learned single Judge of the same High Court dismissing about 25 applications seeking diverse kinds of reliefs, presented by one or the other party. According to the learned single Judge (Maharajan, J.) " these 25 applications represent but a fraction of the bitterness and frustration of an accomplished Syrian Christian couple who after making a mess of their married life have endeavoured to convert this Court into a machinery for wreaking private vengeance ". This observation reflects the feelings of the husband and the wife towards each other in the present litigation. The short question which we are called upon to decide relates to the guardianship of the three children of the parties and the solution of this problem primarily requires consideration of the welfare of the children.

2. The appellant, Rosy Chakramakkal (described herein as wife) was married to respondent Jacob A. Chakramakkal (described herein as husband) sometime in 1952. Three children were born from this wedlock. Ajit *alias* Andrews, son, was born in 1955. Maya *alias* Mary was born in 1957 and Mahesh *alias* Thomas was born in 1961. Sometime in 1962 the wife started proceedings for judicial separation (O. M. S. No. 12 of 1962) on the ground that the husband had inflicted upon her several acts of physical, mental and moral cruelty and obtained a decree on 15th April, 1964, Sadasivam, J., while granting the decree directed that Ajit *alias* Andrews (son) the eldest child should be kept in the custody of the husband and Mary *alias* Maya (daughter) and Thomas *alias* Mahesh (youngest son) should be kept in the custody of the wife. The husband was directed to pay to the wife Rs. 200 per mensem towards the expenses and maintenance of the wife and the two children. The wife applied to Sadasivam, J., sometime later for a direction that Ajit *alias* Andrews should also be handed over to her or in the alternative for a direction that the boy should be admitted in a boarding school. In this application (No. 2076 of 1964) it was alleged by the wife that the husband had beaten Ajit on the ground that he had accepted from his mother (the wife) a fountain pen as a present. This was denied by the husband but the learned Judge, after elaborate enquiry, held that he had no doubt that the husband had caused injuries to the boy on account of his sudden outburst of temper

on learning that Ajit had received a fountain pen by way of present from his mother on his birth-day. Ajit was accordingly directed to be handed over to the mother subject to certain conditions.

3. The husband preferred an appeal against the decree made in O. M. S. No. 12 of 1962 (O. S. A. No. 65 of 1964) and another appeal against the order made by Sadasivam, J., (in Application No. 2076 of 1964 in O. M. S. No. 12 of 1962) directing the custody of the eldest son Ajit to be handed over to the wife (O.S.A. No. 63 of 1964). On 2nd August, 1966 the appellate bench confirmed the decree for judicial separation granted by Sadasivam, J., and also issued certain directions based on agreement of the parties with respect to the custody of the children, as also reduction of the monthly maintenance payable by the husband to the wife from Rs. 200 to Rs. 150 per mensem inclusive of maintenance payable for Mahesh. According to this order the eldest boy Ajit alias Andrews was directed to remain in the custody of the father and to be educated by him at his expense; Mahesh *alias* Thomas was directed to be in the custody of the mother to be educated at her expense : and the second child Maya *alias* Mary was directed to be put in a boarding school, the expenses of her board and education to be met in equal shares by both the parents. The husband also undertook that " he will arrange to have the presence of his mother or sister at his residence to attend to the children whenever they are with him and never to leave the children alone at his residence or to the care of his servants or others." Later both the husband and the wife presented a series of applications in the appellate Court seeking modifications of its directions. That Court ultimately made an order on 2nd February, 1967 modifying its earlier directions. The modified order directed Maya to be left in the exclusive custody of the wife who was at liberty to educate her in the manner she thought best at her own cost. The appellate Court also modified the direction regarding maintenance and ordered that the husband should pay to the wife maintenance at the rate of Rs. 200 per mensem as awarded by the learned single Judge. Subsequently the directions of the appellate Court regarding access of the mother and the father to the children were also sought by the parties to be modified to the prejudice of each other. The matters are stated to have been heard by most of the Judges of the Madras High Court at one stage or the other and according to Maharajan, J., the parties even tried to secure transfer of these proceedings by making wild allegations of partiality against some of the Judges. The husband who is an advocate of the Madras High Court, had, according to the wife, been filing cases systematically against her and the wife, who, in the opinion of Maharajan, J., has the gift of the gab also argued her own cases. The children for whose welfare the parents are supposed to have been fighting as observed by Maharajan, J., are given a secondary consideration and the quarrelling couple have lost all sense of proportion. On account of these considerations the learned single Judge felt that it would be a waste of public time to consider in detail the trivialities of the controversy pressed by both the parties to this litigation. According to the learned single Judge the following four points arose for his judicial determination:

"(1) Whether by defaulting to pay the maintenance decreed, the husband must be held guilty of contempt and shall not be allowed to prosecute his

applications before he purges himself of contempt ?

(2) What is the proper order to pass as regards the custody of the three children of the marriage in the light of the events that have occurred subsequent to the judgment of the appellate Court and under the Guardians and Wards Act ?

(3) What is the proper order to pass as to the access of either parent to the children in the custody of the other ?

(4) Whether in the light of the subsequent events, the order regarding maintenance allowance should be reduced, enhanced or altered in any manner and if so, how?"

4. On the first point the learned single Judge came to the conclusion that the husband could not be declined hearing merely because he had not paid the maintenance as directed by the matrimonial court. The amount in respect of which the husband had defaulted payment could be recovered through execution proceedings. On point No. 2 the learned single Judge proceeded to consider the question of the custody of the three children with the preliminary observation that the controlling factor governing their custody would be their welfare and not the rights of their parents. The eldest child Ajit *alias* Andrews, according to the learned Judge, was doing well at the school and was progressing satisfactorily both mentally and physically. There was accordingly no reason to transfer his custody from his father to his mother. As regards the second child Maya *alias* Mary, as she was about to attain puberty and the wife being anxious that till she got married she must be in the mother's vigilant and affectionate custody she was to remain with her mother. Mahesh *alias* Thomas, who was considered to be of tender years and in the formative stage of life requiring sense of emotional security which a mother alone could give, was also kept in the custody of his mother. With respect to Maya and Mahesh it was further observed that from their educational point of view the wife was a more suitable custodian than the husband because she was running a primary school from nursery to fifth standard with more than a hundred pupils and was also residing in a portion of the school premises enjoying certain facilities in her capacity as the founder and principal of that school. The husband, who was described as a grass widower without female relatives to look after the children, was not preferred to the wife as, while being with her, the children would be living in an academic atmosphere. With respect to the husband's complaint that from the moral point of view the wife was not fit to have the custody of the children, Maharajan, J., observed that earlier Sadasivam, J., had dealt with the entire evidence relating to this charge and had found no sufficient ground for such imputations and that they were likely to cause mental pain to the wife and affect her health. The husband had even been held guilty of mental and moral cruelty to the wife. The husband's contention that this opinion was reversed by the appellate bench was disposed of by Maharajan, J., after quoting the following passage from the appellate judgment dated 2nd August, 1966 :

"But it is to be clearly understood that there should be no slur on the part of either the appellant or the respondent because of the several proceedings in Court and other happenings outside. The decree for judicial separation which is confirmed does not cast any cloud on the reputation or character of the husband or the wife. They have reached this

settlement keeping in view all the circumstances and particularly the welfare of their minor children."

5. According to Maharajan, J., the appellate bench had felt satisfied that the charge of immorality levelled by the husband against the wife was not established because had it not been so satisfied the bench would not have entrusted two of the three children to the wife. The husband was in the circumstances held by Maharajan, J., disentitled to reopen the question of the wife's immorality. In any event Maharajan, J., also rejected the charge of immorality as unproved, for the same reasons which had weighed with Sadasivam, J. With respect to point No. 3 the learned single Judge gave the following directions :

"(1) On the first Sunday of every month, except during the school vacations, the husband shall send Ajit *alias* Andrews to the wife by 8.00 A.M. and the wife shall send back the child by 8. P.M. the same day.

(2) The wife shall send Maya *alias* Mary and Thomas *alias* Mahesh to the husband's house by 8 A.M. on the last Sunday of every month, except during the school vacations, and the husband shall send them back by 8 P. M. the same day.

(3) Each party shall send the children by a conveyance, taxi, rickshaw or bus, after prepaying the fare thereof.

(4) The wife shall send Mary *alias* Maya and Thomas *alias* Mahesh to the husband, so that they might stay with him and Ajit *alias* Andrews for thirty days during the summer vacation. The exact time and dates of departure and arrival will be fixed with reference to the convenience of parties and after exchange of letters between them at least one month prior to the commencement of the vacation. Likewise, the husband will send Ajit to the wife to enable him to spend the whole Dasara and Christmas vacations in the company of his mother, sister and brother."

On the fourth point the learned single Judge, after considering at length the wife's allegations against the husband with respect to his extravagance and inability, reduced the quantum of maintenance payable by him to the wife to Rupees 100 per mensem the reduced amount being payable with effect from 1st January, 1971. The husband was directed to pay the monthly maintenance on or before the 10th of the succeeding month. This order was made with the observations that the earning capacity of the wife was superior to that of the husband.

6. It is unnecessary to refer to the formal orders separately passed in the various applications. Suffice it to say that the parties were left to bear their own costs and hope was expressed in the concluding para. of the judgment by Maharajan, J., that the "parties will refrain from rushing to this Court with applications of the kind that have been dismissed and will apply themselves assiduously to the improvement of their status in their respective professions and to alleviation of the pain of marital failure, which has unfortunately been visited upon the three lovely and sprightly children that they have produced."

7. Contrary to the hope expressed by the learned Judge, the matter was taken to the appellate bench of the High Court in *Jacob A. Chakramakkal* v. *Mrs. Rosy J. Chakramakkal*[1], under clause 15 of the Letters Patent (O.S. Appeal Nos. 2 and 3 of 1971). The wife also presented cross-objections against the reduction of alimony and against directions as regards the

1. (1972) 2 M.L.J. 520.

father's access to Maya. A large number of applications were presented to the Court by both parties praying for diverse reliefs including action for contempt of Court for disobedience of the Court's orders. The hearing of the appeals somewhat surprisingly lasted for more than a year (March 1971 to March 1972). We find no justification for such prolonged hearing on a fairly simple matter like this. According to the Letters Patent Bench the arguments on both sides "mainly rested upon the character of each". The husband is said to have repeatedly accused the wife with immorality. In the opinion of the Letters Patent Bench "the truth or otherwise of the matter may assume importance only for the purpose of deciding upon the fitness of the person to be the guardian of the children". Final orders were passed on 26th April, 1972, by means of which the husband was held to be better fitted to be the guardian of the three children and to have their custody. This decision was stated to be based on evidence and in view of sections 17, 19 and 25 of the Guardians and Wards Act. This is what one of the Judges constituting the Letters Patent Bench (Gokulakrishnan, J.,) said in this connection :

> "In our opinion, the principles to be applied to cases of this kind will be the same both under the Indian Divorce Act and the Guardians and Wards Act, 1890. But since the father has specifically filed a petition, O. P. No. 270 of 1970, under section 25 of the Guardians and Wards Act, and that being a special law for the purpose will certainly apply, we shall concentrate on the Guardians and Wards Act, 1890."

After quoting section 19 of the Guardians and Wards Act the learned Judge proceeded :

> "It is thus clear that the special enactment definitely states that the father is the guardian of the minor until he is found unfit to be the guardian of the person of the minor. The welfare of the minor is the paramount consideration in the matter of appointing guardian for the person of a minor, and cannot be said to be in conflict with the terms of section 19 of the Guardians and Wards Act which recognize the father as the guardian. Bearing this in mind, we proceed to consider as to who is fit and proper to be the guardian for the person of the minor children in this case."

In his view the principle on which the Court should decide the fitness of the guardian mainly depends on two factors: (*i*) the father's fitness or otherwise to be the guardian; and (*ii*) the interests of the minors. Considering these factors it was felt that both the parties in the present case loved their children who were happy during their stay with both of their parents. There was, in his view, absolutely no proof as regards disqualification of the husband to be the guardian of the minor children. It may here be pointed out that both the Judges constituting the Letters Patent Bench wrote separate judgments. Gokulakrishnan, J., commenting on the judgment of Maharajan, J., observed thus :

> "Maharajan, J., in his judgment under appeal no doubt referred to section 19 of the Guardians and Wards Act, but would observe that if the Court finds that the welfare of the minor children could be protected only in the maternal custody, the Court has power to put the children in the care and custody of the mother. The learned Judge clearly observes that Ajit, the eldest boy, who is in the custody of the appellant, is quite healthy and cheerful, doing well at school and that his *sojourn* with the father has not prejudicially affected him physically or mentally. But at

the same breath, the learned Judge says that Maya and Mahesh 'are of tender years and in the formative stage of their life and need a sense of emotional security, which a mother alone can give'. In the case of Maya and Mahesh, the learned Judge has applied a different standard in regard to their custody. Considering the present age of both Maya and Mahesh and taking into consideration the upbringing of Ajit by the appellant having him in his custody, we are of the view that the same amount of sense of emotional security can be enjoyed by Maya and Mahesh at the hands of the appellant also. The learned Judge's reasoning that the mother is running a school and has also facilities to make these two children live in the academic atmosphere rather than with their father, cannot have any force in view of the clear and categorical principles laid down in the various decisions noticed (supra) and also in view of the clear intendment and spirit of the Guardians and Wards Act, which prescribes that father is the guardian of his minor child unless otherwise found unfit. The academic qualification of the mother, her financial status and the other standards cannot at all weigh in the matter when the appellant has not been rejected as a person unfit to be the guardian of the minors. If they should weigh, the poorer and affectionate father with moderate capacity to protect his children will be deprived of the custody of the minor children on the flimsy ground of 'welfare of the minor children'. That is how and why 'the welfare of the minor children' must be read with 'fitness or unfitness of the father' to be the guardian of the minors. Once it is found that the father is the fit and proper person to be the guardian of his minor children, unless it is otherwise found that he is not fit, it must be presumed that the children's interests will be properly protected by the father. As far as the present case is concerned, when the trial Court itself has found that Ajit has been properly looked after and brought up very well in his academic career by the appellant, there cannot be any difficulty in coming to the conclusion that Maya and Mahesh will also be looked after and protected and imparted with proper education by the affectionate father, the appellant."

8. After reproducing certain observations from the judgments of (i) Sadasivam J., dated 15th April, 1964, (ii) Veeraswamy, J., (as he then was) and Krishnaswami Reddy, J., dated 12th February, 1967 in C. M. P. No. 415 in O.S.A. Nos. 63 and 65 of 1969, Ramamurthy, J., dated 24th April, 1968 in application Nos. 769 and 770 of 1968 in O. M. S. No. 12 of 1962 and after referring to the view of Maharajan, J., that Ajit when produced in Court was found quite healthy and cheerful and was doing well at school, Venkataraman, J., in his concurring judgment observed thus :—

> "Regarding the other children, he gave their custody to the mother, because he thought that they were of tender years and needed emotional security which a mother alone could give. Here, with respect we must differ from the learned Judge. We find that the father is quite fit to have the custody of the children, and, in law, custody of the minor children cannot be refused to him. We are also satisfied from what we saw of the appellant and heard from him during the several hearings, that he is very deeply attached to his children and is quite competent to have their custody. It will be enough if the mother is allowed a somewhat liberal access to the three children."

With respect to alimony the appellate bench concluded that the wife was managing her school very successfully; she had purchased a mini-bus and also possessed wet lands in her village. The husband on the other hand was not getting on well in his profession which he attributed to the present litigation; his house at Adyar, was stated to be under mortgage and he had practically sold everything in his native village with the exception of one or one-and-half acres of land. In view of the financial position of the wife and the husband and in view of the fact that all the three children were to be in the custody of the husband the appellate bench considered it unnecessary for the husband to pay any maintenance to the wife. The payment of the arrears of alimony was also suspended as the appellate bench considered itself empowered to do so under the proviso to section 37 of the Indian Divorce Act. In so far as access of the wife to the children is concerned a detailed order was passed by the bench about the right of the wife to take the daughter with her during the summer and Christmas vacations and also during several days every month, particularly during the periods. We do not consider it necessary to state in full the details of that order. With respect to Ajit and Mahesh also a detailed order was made fixing the precise days and even time when the wife could bring the children from the father to stay with her. In the event of any difficulty in getting custody of the children from the wife, it was ordered at the instance of the husband, that he could take the police help on the strength of the High Court judgment. We find it extremely difficult to appreciate this direction. Orders from the Court in execution would have been more appropriate. Police intervention in such personal domestic differences in the present case where parties belong to educated respectable families should have been avoided.

9. In this Court a preliminary objection to the hearing of the wife's appeal was raised by the husband, who, being an advocate, personally addressed us in opposing these appeals. Indeed, in June, 1972 he had presented Civil Miscellaneous Petitions Nos. 4188 and 4189 of 1972 for revoking special leave and it was these applications which he pressed before us at the outset. These lengthy applications covering nearly 50 pages mainly contain arguments on the merits and there is hardly any cogent ground made out justifying revocation of the special leave. It is no doubt open to this Court to revoke special leave when it transpires that special leave had been secured by the appellant on deliberate misrepresentation on a material point having a bearing on the question of granting such leave. The extraordinary discretionary power vested in this Court by the Constitution under Article 136 is in the nature of a special residuary power exercisable in its judicial discretion outside the purview of ordinary law in cases where the needs of justice demand interference. Being discretionary power intended only to promote the cause of justice when there is no other adequate remedy, this Court expects those seeking resort to this reserve of constitutional power for securing justice to be asolutely fair and frank with this Court in correctly stating the relevant facts and circumstances of the case. In the event of a party making a misrepresentation on a point having a bearing on the question of the exercise of judicial discretion and thereby trying to over-reach this Court the party forfeits the claim to the discretionary relief; the same is the case when such misrepresentation is discovered by this Court and brought to its notice after the grant of special leave and this Court is competent and indeed it considers it proper to

revoke the special leave thus obtained. But the misrepresentation must be deliberate and on a point having such relevance to the question of special leave that if true facts were known this Court would have in all probability declined special leave. Applying this test to the present case we are unable to find any such deliberate misrepresentation by the appellant indicating intention to mislead or overreach this Court. The points to which our attention was drawn seem to relate to the merits of the controversies between the parties which would fall for determination on the hearing of the appeal after considering the arguments pro and con. The preliminary objection thus fails and must be disallowed.

10. Turning to the merits of these appeals, it may be pointed out that with the exception of O. P. No. 270 of 1970 filed by the husband under section 25 of the Guardians and Wards Act all the other applications presented by the parties and disposed of by Maharajan, J., were offshoots of O.M.S. No. 12 of 1962 in which the wife had obtained a decree for judicial separation. The first contention raised on behalf of the appellant was that O. P. No. 270 of 1970 did not lie. It was strenuously pressed by Shri Balasubramania Iyer the Counsel for the appellant-wife that the husband's application under section 25, Guardians and Wards Act was not competent because none of the children had been illegally removed from the lawful custody of their father, the custody of the two children having been lawfully entrusted to the wife in proceedings to which the husband was a party. It was emphasised in this connection that the custody of the girl Maya and of the boy Mahesh had been lawfully entrusted to the wife by a competent Court and unless there is actual physical removal of the children from the custody of the father, Section 25 would not be attracted.

11. Now the first thing to be noticed is that this objection as to the competence of the application under section 25 is in the nature of a preliminary objection. But it was not raised either before the learned single Judge or before the Letters Patent Bench in the manner in which it is pressed before us. In this Court also in the Special Leave appeal the objection seems to be based on the argument that the Guardians and Wards Act would be inapplicable to cases where orders have been made in matrimonial proceedings, and section 19 of the Guardians and Wards Act cannot control the custody of children given by a consent decree under the Indian Divorce Act. However, as the objection was stated to pertain to jurisdiction we allowed the parties to address us on this point.

12. For determining the question of competence of the husband's application under section 25 of the Guardians and Wards Act (XVIII of 1890) it is necessary to examine the scheme of that Act as also the relevant provisions of the Indian Divorce Act. The Guardians and Wards Act was enacted in order to consolidate and amend the law relating to Guardian and Ward. But as provided by section 3, this Act is not to be construed, *inter alia,* to take away any power possessed by any High Court. According to section 4, which is the definition section, a minor is a person who, under the provisions of the Indian Majority Act, 1875 is to be deemed not to have attained his majority under section 3 of that Act. This age is fixed at 18 years, except for those, for whose person or property or both a guardian has already been appointed by a Court of justice other than a guardian for a suit under Chapter XXXI, Civil Procedure Code and for whose property, superinten-

dence has been assumed by a Court of Wards for whom it is fixed at 21 years. A 'ward' under this Act means a minor for whose person or property or both there is a guardian and "guardian" is a person having the care of the person of a minor or of his property or of both. Chapter II of this Act (XVIII of 1890), consisting of sections 5 to 19 (section 5 applicable to European British subjects has since been repealed), deals with the Appointment and Declaration of Guardians. Section 7 empowers the Court to make orders as to guardianship where it is satisfied that it is for the welfare of the minor that an order should be made appointing his guardian or declaring a person to be such guardian. Section 7 (3) places certain restrictions with respect to cases where guardians have been appointed by will or other instrument or appointed or declared by Court. Section 8 provides for persons entitled to apply under section 7. They include Collectors as specified in clauses (*c*) and (*d*). Sections 9 to 11 provide for jurisdiction of Courts, form of application and procedure on admission of applications. Section 12 provides for interlocutory orders subject to certain restrictions. Next important sections are sections 17 and 19. Section 17 which provides for the matters to be considered by the Court in appointing or declaring a guardian reads :

> "17. *Matters to be considered by the Court in appointing guardian.*—(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
>
> (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor the wishes, if any, of the deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.
>
> (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference."

Section 19, which prohibits the Court from appointing guardians in certain cases reads :

> "19. *Guardians not to be appointed by the Court in certain cases.*—
>
> Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person—
>
> (*a*) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or
>
> (*b*) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or
>
> (*c*) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

Chapter III (Ss. 20 to 42) prescribes duties, rights and liabilities of guardians. Sections 20 to 23 (General provisions) do not concern us. Section 20 provides for the fiduciary relationship of guardian towards his ward and section 22 provides for remuneration of guardians appointed or declared by the Court. Sections 24 to 26 deal with " Guardian of the Person ". Under section 24 the guardian is bound, *inter alia*, to look to his ward's

support, health and education. Section 25 which is of importance for our purpose provides for " Title of Guardian to custody of ward " and reads :

> 25. *Title of guardian to custody of ward*—(1) If a ward leaves or is removed from the custody of a guardian of his person the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.
>
> (2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882.
>
> (3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

Sections 27 to 37 deal with Guardian's Property " and sections 38 to 42 deal with " Termination of Guardianship ". Chapter IV (sections 43 to 51) is the last chapter dealing with supplementary provisions.

13. Now it is clear from the language of section 25 that it is attracted only if a ward leaves or is removed from the custody of a guardian of his person and the Court is empowered to make an order for the return of the ward to his guardian if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian. The Court is entrusted with a judicial discretion to order return of the ward to the custody of his guardian, if it forms an opinion that such return is for the ward's welfare. The use of the words " ward " and " guardian " leaves little doubt that it is the guardian who, having the care of the person of his ward, has been deprived of the same and is in the capacity of guardian entitled to the custody of such ward, that can seek the assistance of the Court for the return of his ward to his custody. The guardian contemplated by this section includes every kind of guardian known to law. It is not disputed that, as already noticed, the Court dealing with the proceedings for judicial separation under the Indian Divorce Act, (IV of 1869) had made certain orders with respect to the custody, maintenance and education of the three children of the parties. Section 41 of the Divorce Act empowers the Court to make interim orders with respect to the minor children and also to make proper provision to that effect in the decree. Section 42 empowers the Court to make similar orders upon application (by petition) even after the decree. This section expressly embodies the legislative recognition of the fundamental rule that the Court as representing the State is vested with the power as also the duty and responsibility of making suitable orders for the custody, maintenance and education of the minor children to suit the changed conditions and circumstances. It is, however, noteworthy that under the Indian Divorce Act the sons of Indian fathers cease to be minors on attaining the age of 16 years and their daughters cease to be minors on attaining the age of 13 years: Section 3 (5). The Court under the Divorce Act would thus be incompetent now to make any order under sections 41 and 42 with respect to the elder son and the daughter in the present case. According to the respondent-husband under these circumstances he cannot approach the Court under the Divorce Act for relief with respect to the custody of these children and now that these children have ceased to be minors under that Act, the orders made by that Court have also lost their vitality. On this reasoning the husband claimed the right to invoke

section 25 of the Guardians and Wards Act; in case this section is not applicable then the husband contended, that his application (O.P. No. 270 of 1970) should be treated to be an application under section 19 of the Guardians and Wards Act or under any other competent section of that Act so that he could get the custody of his children, denied to him by the wife. The label on the application, he argued, should be treated as a matter of mere form and, therefore, immaterial. The appellant's Counsel on the other hand contended that the proper procedure for the husband to adopt was to apply under section 7 of the Guardians and Wards Act. Such an application, if made, would have been tried in accordance with the provisions of that Act. The Counsel added that sections 7 and 17 of that Act also postulate welfare of the minor in the circumstances of the case, as the basic and primary consideration for the Court to keep in view when appointing or declaring a guardian. The welfare of the minors in the present case, according to the wife, would be best served if they remain in her custody.

14. In our opinion, section 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being *ex facie* to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian to properly look after the ward's health, maintenance and education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian of the necessary assistance from the Court in-effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare. If the Court under the Divorce Act cannot make any order with respect to the custody of Ajit *alias* Andrew and Maya *alias* Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under section 19 during his lifetime, if the Court does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is section 25. Without therefore, laying down exhaustively the circumstances in which section 25 can be invoked, in our opinion, on the facts and circumstances of this case the husband's application under section 25 was competent with respect to the two elder children. The Court was entitled to consider all the disputed questions of fact or law properly raised before it relating to these two children. With respect to Mahesh *alias* Thomas, however, the Court under the Divorce Act is at present empowered to make suitable orders relating to his custody, maintenance and education. It is, therefore, somewhat difficult to impute to, the Legislature an intention to set up another parallel Court to deal with the question of the custody of a minor which is within the power of a competent Court under the Divorce Act. We are unable to accede to the respondent's suggestion that his application should be considered to have been preferred for appointing or declaring him as a guardian. But whether the respondent's prayer for custody of the minor children be considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan, J., with which observation we entirely agree, " the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents ". It was not disputed that under the Indian Divorce Act this is the controlling consideration. The Court's power under section 25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the considera-

tion of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom — if ever — identical. The contention that if the husband is not unfit to be the guardian of his minor children then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading. It does not take full notice of the real core of the statutory purpose. In our opinion, the dominant consideration in making orders under section 25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of their children, the approach has to be somewhat different from that adopted by the Letters Patent Bench of the High Court in this case. There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under section 25 merely because there is no defect in his personal character and he has attachment for his children — which every normal parent has. These are the only two aspects pressed before us, apart from the stress laid by the husband on the allegations of immorality against the wife which, in our firm opinion, he was not at all justified in contending. Such allegations, in view of earlier decisions, had to be completely ignored in considering the question of custody of the children in the present case. The father's fitness from the point of view just mentioned cannot override considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute generally to be better fitted to look after the children — being normally the the earning member and head of the family — but the Court has in each case to see primarily to the welfare of the children in determining the question of their custody, in the background of all the relevant facts having a bearing on their health, maintenance and education. The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they get their due share of affection and care from both the parents in their normal parental home. Where, however, family dissolution due to some unavoidable circumstances becomes necessary the Court has to come to a judicial decision on the question of the welfare of the children on a full consideration of all the relevant circumstances. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because

of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them. The children are not mere chattels : nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian Court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us to have erred in reversing him on grounds which we are unable to appreciate.

15. At the bar reference was made to a number of decided cases on the question of the right of the father to be appointed or declared as guardian and to be granted custody of his minor children under section 25 read with section 19 of the Guardians and Wards Act. Those decisions were mostly decided on their own peculiar facts. We have, therefore, not considered it necessary to deal with them. To the extent, however, they go against the view we have taken of section 25 of the Guardians and Wards Act, they must be held to be wrongly decided.

16. The respondent's contention that the Court under the Divorce Act had granted custody of the two younger children to the wife on the ground of their being of tender age, no longer holds good and that, therefore, their custody must be handed over to him appears to us to be misconceived. The age of the daughter at present is such that she must need the constant company of a grown-up female in the house genuinely interested in her welfare. Her mother is in the circumstances the best company for her. The daughter would need her mother's advice and guidance on several matters of importance. It has not been suggested at the bar that any grown-up woman closely related to Maya *alias* Mary would be available in the husband's house for such motherly advice and guidance. But this apart, even from the point of view of her education, in our opinion, her custody with the wife would be far more beneficial than her custody with the husband. The youngest son would also, in our opinion, be much better looked after by his mother than by his father who will have to work hard to make a mark in his profession. He has quite clearly neglected his profession and we have no doubt that if he devotes himself wholeheartedly to it he is sure to find his place fairly high up in the legal profession.

17. The appellant's argument based on estoppel and on the orders made by the Court under the Indian Divorce Act with respect to the custody of the children did not appeal to us. All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based on consent decrees, cited at the bar. Orders relating to custody of wards even when based on consent were liable to be varied by the Court, if the welfare of the wards demands variation.

18. We accordingly allow the appeal with respect to the custody of the two younger children and setting aside the judgment of the Letters Patent

Bench in this respect, restore that of the learned single Judge who, in our view, had correctly exercised his discretion under section 25 of the Guardians and Wards Act. The directions given by him with respect to access of the parties to their children are also restored.

19. As regards alimony, no doubt, the Letters Patent Bench was, in our opinion, not quite right in withholding payment of the alimony already fallen due and in arrears. But in view of the fact that the financial position of the wife is far superior to that of the husband who according to his own submission has yet to establish himself in his profession, we do not consider it just and proper to interfere with that order under Article 136 of the Constitution. With respect to the alimony, therefore, the appeal fails and is dismissed. We also direct that the parties should bear their own costs throughout.

20. Before concluding we must also express our earnest hope, as was done by the learned single Judge, that the two spouses would at least for the sake of happiness of their own offspring, if for no other reason, forget the past and turn a new leaf in their family life, so that they can provide to their children a happy domestic home, to which their children must be considered to be justly entitled. The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses before us who are both educated and cultured and who come from highly respectable families must realise that reasonable wear and tear and normal jars and shocks, of ordinary married life have to be put up within the larger interests of their own happiness and of the healthy, normal growth and development of their offspring, whom destiny has entrusted to their joint parental care. Incompatibility of temperament has to be endeavoured to be disciplined into compatibility and not to be magnified by abnormal impulses or impulsive desires and passions. The husband is not disentitled to a house and a house-wife, even though the wife has achieved the status of an economically emancipated woman; similarly the wife is not a domestic slave, but a responsible partner in discharging their joint parental obligation in promoting the welfare of their children and in sharing the pleasure of their children's company. Both parents have, therefore, to co-operate and work harmoniously for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home.

V.K. —— *Appeal allowed in part.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*M. H. Beg and R. S. Sarkaria, JJ.*

Collector of Customs, Madras and others .. *Appellants**

v.

D. Bhoormull .. *Respondent.*

(A) *Sea Customs Act* (*VIII of* 1878), *sections* 178, 167, (8) *and* 178-A—*Imposition of penalty of confiscation of smuggled goods not covered by section* 178-A—*Onus of proving that the goods are smuggled—On whom lies—Onus how discharged—Scope and nature of evidence required—Applicability of principle underlying section* 106, *Evidence Act.*

It cannot be disputed that in proceedings for imposing penalties under clause (3) of section 167 of the Sea Customs Act to which section 178-A does not apply the burden of proving that goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory

* C.A. No. 1142 of 1973. 3rd April, 1974.

provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, due regard must be paid to other kindred principles, no less fundamental of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for in all human affairs absolute certainty is a myth and all exactness is a fake. *El Dorado* of absolute proof being unattainable, the law accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case. [*Para.* 30.]

The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered according to the proof which it was in the power of one side to prove and in the power of the other to have contradicted. Since it is exceedingly difficult if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obligaed to prove them as part of its primary burden. [*Para.* 31.]

Another point to be noted is that the penalty of confiscation is a penalty *in rem* which is enforced against the goods. It is not necessary for the customs authorities to prove that any particular person is concerned with their illicit importation or exportation. It is enough if the department furnishes *prima facie* proof of the goods being smuggled stocks. [*Para.* 33.]

It is true that in criminal trials to which the Evidence Act, in terms, applies, section 106 of the Evidence Act is not intended to relieve the prosecution of the initial burden which lies on it to prove the positive facts of its own case, it can be said by way of generalisation that the effect of the material facts being exclusively or especially within the knowledge of the accused, is that it may, proportionately with the gravity or the relative triviality of the issues at stake, in some special type of cases, lighten the burden of proof resting on the prosecution. [*Para.* 43.]

The broad effect of the application of the basic principle underlying section 106 of the Evidence Act to cases under section 167 (8) is that the Department would be deemed to have discharged its burden if it adduces only so much evidence, circumstantial or direct, as is sufficient to raise a presumption in its favour with regard to the existence of the facts sought to be proved. [*Para.* 44.]

Many facts relating to the illicit business of smuggling remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying section 106, Evidence Act, the burden to establish those facts is cast on the persons concerned and if he fails to establish or explain those facts, an adverse inference of fact may arise against him, which coupled with the presumptive evidence adduced by the prosecution would rebut the initial presumption of innocence in favour of that person and in the result prove him guilty. [*Para.* 32.]

It is not correct to say that the present is a case of no evidence. While it is true that no direct evidence of the illicit importation of the goods was adduced by the department, it had made available several circumstances of a determinative character which coupled with the inference arising from the dubious conduct of the parties concerned, could reasonably lead to the conclusion drawn by the Collector of Customs that they were smuggled goods. [*Para.* 35.]

(B) *Constitution of India* (1950), *Article* 226—*Sea Customs Act* (*VIII of* 1878), *section* 167(8)—*Proceedings under—Collector of Customs holding that goods were proved to be smuggled and ordering their confiscation—Writ petition challenging order—High Court if can reappraise evidence and interfere with order of Collector.*

Even if the Division Bench of the High Court felt that the circumstantial evidence was not adequate enough to establish the smuggled character of the goods, beyond doubt, then also that was not a good ground to justify interference with

the Collector's order in the exercise of the writ jurisdiction under Article 226 of the Constitution. The function of weighing the evidence or considering its sufficiency was the business of the Collector or the appellate authority which was the final tribunal of fact. So long as the Collector's appreciation of the circumstantial evidence before him was not illegal, perverse or devoid of commonsense or contrary to rules of natural justice, there would be no warrant for disturbing his finding under Article 226. In the present case the Collector's order under section 167 (8) of the Sea Customs Act was not of this kind. [*Para.* 36.]

Cases referred to:—

Issardas Daulat Ram v. *Union of India* (1962) 1 S.C.R. (Supp.) 358: 1966 Crl. L.J. 1507: (1962) 2 S.C.J. 286: A.I.R. 1966 S.C. 1867; *Kanungo & Co.* v. *Collector of Customs, Calcutta,* (1972) Mer.L.R. 17 : (1973) 2 S.C.J. 219 : (1973) S.C.C. (Crl.) 846 : (1973) 2 S.C.C. 438: A.I.R. 1972 S.C. 2136 ; *Ambalal* v. *Union of India,* (1961) 1 S.C.R. 933 : (1961) 1 Crl.L.J. 326 : I.L.R. (1961) 1 Punj. 685: A.I.R. 1961 S.C. 264; *Blatch* v. *Archer,* (1774) 1 Cowp. 63; *Queen* v. *Madhub Chander,* (1874) 21 W.R.Cr. 13; *Shambu Nath Mehra* v. *State of Ajmer,* 1956 S.C.R. 199 : 1956 Crl.L.J. 794 : 1956 S.C.J. 429 : (1956) 2 M.L.J. (S.C.) 1: A.I.R. 1956 S.C. 404.

The Judgment of the Court was delivered by

Sarkaria, J.—This appeal by Special Leave arises out of the following facts:

On receiving information that some packages containing smuggled goods had been left by a person in the premises of M/s. Shah Rupaji Rikhabdas at 98, Narayana Mudali Lane, Madras-1 and that these packages were about to be despatched to Bangalore for disposal, a posse of Preventive Officers of the Customs House went to the said shop on 4th June, 1962. They found ten packages in that shop. Baboothmull of M/s. Shah Rupaji Rikhabdas was present there. The officers questioned Baboothmull about those packages. Baboothmull replied that he was not the owner of those packages and that somebody next to his shop had left them outside the premises and since that person had not returned for a considerable time, he got them removed into the shop. Baboothmull was unable to throw any light with regard to the owner or the contents of the packages.

2. After getting a consent letter from Baboothmull, the officers opened the packages which contained these articles of the total value of Rs. 12,255.

				Rs.
1.	Parker Fountain pens (19 made in Canada)	28 Doz.	..	3,360
2.	Master hair clippers made in Germany	5 Doz.	..	600
3.	Oster Hair Clippers made in Germany	3½ Doz.	..	400
4.	Venus Pencils made in England	760 Doz.	..	2,250
5.	K. 55 Out Thread Razors made in Germany	68 Doz.	..	4,080
6.	Nylon Buttons made in Japan	47 Gross	..	705
7.	Gillette Razor Blades made in England	1000 Pcs.	..	120
8.	7 O'clock Razor sets made in England	12 Doz.	..	730
		Total	..	12,255

3. The Officers seized these goods under a mahazarnama.

4. On 9th June 1962, a letter was addressed by the said Baboothmull to the Collector, Customs, informing that on that date, the owner of the packages, one Mr. D. Bhoormull turned up to claim the goods; that his other partner was absent at the time of the seizure of the goods who knew about this affair and that he had subsequently learnt from this partner that those goods belonged to D. Bhoormull who had left instructions for their storage in the shop. Subsequently the name of this partner was given as Indermul. The Customs Officers attempted to find out and contact this Indermul but without success.

5. Eight days after the seizure, a letter dated 12th June, 1962, was received by the Collector of Customs from one D. Bhoormull (Poonawala, temporarily at 98, Narayana Mudali Lane, Madras-1) claiming ownership of the goods. In this letter it was stated that he had purchased these goods on 3rd June, 1962, in the local market at Madras through brokers; that he was packing the same till late in the evening, and since he was forced to leave for Bangalore on the call of a friend immediately, he instructed one of the staff of Shah Rupaji Rikhabdas to keep the goods in their shop until his return. This letter of Bhoormull did not contain the names or the particulars of the brokers from whom the goods were allegedly purchased; nor did it refer to any bill, voucher or other document to support the allegation of their having been purchased locally in the normal course of business. On receipt of this letter, the Collector made an attempt to contact Bhoormull for further investigation. Bhoormull, however, could not be contacted as he had gone away to Poona which was said to be his normal place of activity.

6. Another letter, dated 25th June, 1962, was received by the Collector from Bhoormull urging for release of his goods at an early date.

7. On 3rd July, 1962, a letter was received by the Collector from M/s. Gagrat & Co., Solicitors, Bombay on behalf of Bhoormull, requesting for disclosure of the grounds for the seizure of the goods, and for supply of the copies of the mahazarnama and other relevant documents relating to the seizure. It was reiterated that the goods had been *bona fide* purchased by Bhoormull in the course of business, and as such, were not liable to seizure or confiscation. This was followed by another letter dated 14th September, 1962 from M/s. Gagrat & Co., addressed to the Assistant Collector of Customs wherein the request for supply of the necessary information, was reiterated.

8. The importation of goods shown, as items 1, 4 and 7 had been prohibited since December, 1957 and of those as items 2, 3, 5, 6 and 8 since March, 1960, save under a licence issued by the Import Trade Control Authorities under section 19 of the Sea Customs Act read with section 3 (1) of the Imports and Exports Control Act, 1947.

9. The Assistant Collector of Customs on 26th October, 1962 issued a notice to Bhoormull through his solicitors. M/s. Gagrat & Co., Bombay, requiring him to produce evidence of *bona fide* acquisition of the goods in question failing which to show cause within a week as to why those goods valued at Rs. 12,255 be not confiscated under section 167 (8) of the Sea Customs Act read with section 3 (2) Imports and Exports Control Act, 1947. It was added that in case no reply was received within the specified period the case would be decided *ex parte* on the basis of the facts already on record without further reference to him.

10. In reply, a letter, dated 13th December, 1962, was written by the solicitors in which, it was *inter alia* stated that on 4th June, 1962, at Madras, the goods, being items 2 and 4 to 8, were purchased by their client from Broker Ram Lal for a total price of Rs. 10,675 and those shown as items 1 and 3, from Broker Shanthi Lal for a sum of Rs. 4,872 and that these brokers had not issued any bills or receipts regarding those goods. Any further particulars or addresses of the brokers were not disclosed.

11. On 27th March, 1963, a revised show cause notice was sent under registered cover by the Collector of Customs to Bhoormull through his solicitors requiring him to produce within a week the

purchase receipts, bills, vouchers, Customs auctions-receipts, Central excise auction-receipts, licences or any other documents in his possession and to furnish the names of the brokers in the market, their addresses etc. from whom the goods were purchased by him, failing which to show cause against confiscation of the goods.

12. The information called for was not supplied, nor did Bhoormull appear personally before the Collector at any stage.. However, on his behalf the solicitors wrote to the Collector, a letter, dated 30th April, 1963, contending that the burden of proving that the seized goods had been illegally imported into India lay on the Customs Department and the non-production of the documents or non-furnishing of the information asked for by the Collector could not justify an inference of illicit importation of the goods. It was added that such goods had been imported as late as 1959/1960 as personal baggages and had in fact been sold by the Customs Department at Madras and elsewhere and as such were being freely bought and sold in the market.

13. A date was fixed by the Collector for personal hearing of Bhoormull. But he did not personally appear. However, on 1st August, 1963, Shri J. R. Gagrat of M/s. Gagrat & Co., appeared before the Collector with a representative of Bhoormull, and contended that unless the Department had any other indication, it would not be necessary for Bhoormull to establish ownership of the goods; that there were no purchase-vouchers; nor was he in a position to produce the broker who was supposed to have left the goods near the shop of Baboothmull.

14. While conceding that the burden of proving the goods to be smuggled goods, was on the Department, the Collector held that such burden *prima facie* stood discharged as the circumstances of this case irresistibly led to the conclusion that the goods had been illicitly imported. The main circumstances, taken into account by the Collector, in raising such an inference, may be arranged as under:

(*i*) The import of such goods has been totally prohibited since 1957 except in the case of hair clippers and Venus Pencils, which were allowed on a highly restricted quota-basis till October, 1959/March, 1960 Policy period, when their import too was banned.

(*ii*) The highly suspicious circumstances of the seizure and the dubious conduct of the parties in relation thereto: (*a*) This large number of goods, all of foreign origin, worth over Rs. 12,000 were found fully packed and ready for despatch; (*b*) Baboothmull from whose possession they were seized gave conflicting and evasive explanations in regard thereto. At the time of seizure on 4th June, 1962 he disclaimed all knowledge about the ownership and contents of those packages, and said they were left outside the shop by a broker whom he could not identify. Some days later, he "appeared in the arena (garb?) of an anonymous (fictitious?) person, one Bhoormull"; (*c*) It was eight days after the seizure that one Bhoormull by a letter claimed ownership of the goods, and Baboothmull, also confirmed this. 'This Bhoormull the alleged owner of the goods has never been seen. Even at the personal hearing, a representative from him came........All the correspondence was exchanged with the firm of solicitors, namely M/s. Gagrat & Co., of Bombay"; (*d*) Despite repeated requisitions made and two show cause notices given by the Collector, no bill, voucher or other documentary evidence, whatever, regarding purchase of the goods in the recognised markets of the country was produced. At first, even the names of the sellers were not disclosed. Later on M/s. Gagrat & Co., cited two brokers whose addresses were not furnished.

15. In view of the above circumstances the Collector held that there "was no room for doubt that the goods were acquired from illegally imported stocks." He, therefore, ordered their confiscation under section 167 (8) of the Sea Customs Act.

16. Against this order dated 24th October, 1963, Bhoormull carried an appeal under section 131 of the Customs Act, 1962 to the Central Board of Revenue which dismissed the same on 7th September, 1964. Aggrieved, Bhoormull preferred a Revision Petition to the

Central Government. It was dismissed by the Secretary to the Government by an order, dated 7th September, 1965.

17. Bhoormull then moved the High Court at Madras by a writ petition under Article 226 of the Constitution impugning the aforesaid orders of the Collector, the Board and the Central Government, contending that the confiscation was illegal because the Customs Department on which the onus of proving the unlawful importation of the goods lay, had failed to adduce any evidence whatever, to discharge that onus. The learned single Judge who tried the petition repelled this contention, holding that the circumstances on record established "every probability of the goods having been illicitly imported to India", and dismissed the petition.

18. Against the order of the learned single Judge, Bhoormull filed an appeal under clause (15) of the Letters Patent to the Division Bench of the High Court which held that the onus on the Department to prove that the goods had been smuggled, could not—in this case did not—shift to Bhoormull and that the latter's failure to appear personally or prove before the Collector how he had come by those goods, did not justify an inference of their illicit importation, because a mere suspicion cannot be a substitute for proof. On the above reasoning, the Bench allowed the appeal and quashed the Collector's order of confiscation of the goods. Hence this appeal, with Special Leave, by the Department.

19. Before dealing with the contentions canvassed, we would refer briefly to the relevant statutory provisions.

20. Section 167 of the Sea Customs Act provides for offences punishable to the extent mentioned in the 3rd column of the Schedule appended to that section. Clause (8) of that Schedule provides that if any goods the importation or exportation of which is for the time being prohibited or restricted by order under Chapter IV of this Act be imported into or exported from India contrary to such prohibition or restriction, then: (*i*) such goods "shall be liable to confiscation; and (*ii*) any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding 1,000 rupees".

21. Section 171-A specifically empowers the Customs Officers employed in the prevention of smuggling to summon any person whose attendance he considers necessary either to give evidence or to produce a document or thing in an enquiry in connection with the smuggling of any goods and such person shall be bound to state the truth and produce that document or thing and would be liable to prosecution if he made a false statement.

22. A reading of section 167 (8) and the related provisions indicates that proceedings for confiscation of contraband goods are proceedings *in rem* and the penalty of confiscation under the first part of the entry in column (3) of clause (8) of the Schedule, is enforced against the goods irrespective of whether the offender is known or unknown. But imposition of the other kind of penalty, under the second part of the entry in column 3, is one in *personam*; such a penalty can be levied only on the "person concerned" in any offence described in column 1 of the clause.

23. Goods found to be smuggled can, therefore, be confiscated without proceeding against any person and without ascertaining who is their real owner or who was actually concerned in their illicit import.

24. Section 178 empowers an officer of the Customs or anti-smuggling staff to seize anything liable to confiscation.

25. Section 178-A provides for burden of proof. It says:

> "(1) Where any goods to which the section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.
>
> (2) This section shall apply to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may, by notification in the Official Gazette, specify in this behalf.

(3) Every notification issued under sub-section (2) shall be laid before both Houses of Parliament as soon as may be after it is issued".

26. Large scale smuggling of gold or other goods into India may pose a threat to the economic and fiscal interests and policies of the State. Such illicit trade is often carried on by organized international smugglers in the secrecy of the under-world. The more it is organized, the less are the chances of its detection, and greater the difficulty of proving the offences relating thereto. Laws have therefore been enacted in most countries, which mark a partial or wholesale departure in matters relating to smuggling, from the general principle of penal law, *viz*., that it is for the State or its Department to prove the offence against the accused or the defendant. Thus in England, section 290 (2) of the Customs and Excise Act, 1952 provides that where in any proceeding relating to Customs or Excise any question arises as to the place from which any goods have been brought or as to whether or not any duty has been paid or any goods have been lawfully imported etc., then the burden of proof shall lie upon the other party to the proceeding. In India, Parliament inserted section 178-A by the Amending Act X of 1957, but it did not, in its wisdom go as far as section 290 (2) of the English Act. Section 178-A in terms applies to "gold, gold manufacture, diamonds and other precious stones, cigarettes and cosmetics". With regard to these specified goods if seized under this Act in the reasonable belief that they are smuggled goods, the burden of proof that they are not such goods shall be on the person from whose possession, they are seized. But with regard to any other goods, the rule in sub-section (1) of section 178-A would not apply unless the Central Government had specifically applied the same by notification in the Official Gazette. It is common ground that at the material time, no such notification applying the section to the categories of the goods in question had been issued. In respect of such goods the provisions of the Evidence Act and the Code of Criminal Procedure, do not, in terms, govern the onus of proof in proceeding under section 167 (8) of the Act. In conducting these penal proceedings, therefore, the Collector of Customs is to be guided by the basic canons of criminal jurisprudence and natural justice.

27. With the above prefatory remarks, we now advert to the contentions canvassed before us.

28. Mr. Sanghi, learned Counsel for the appellants, has advanced these arguments:

(*a*) Bhoormull had no *locus standi* to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution because there was not even *prima facie* evidence to show that at the time of seizure, he was in ownership or juridical possession of the goods;

(*b*) The onus of proving the goods to be smuggled goods that initially lay on the Department, stood sufficiently discharged by the inevitable inference arising out of the totality of the circumstances in this case, which were appraised by the Collector in the light of the conduct of Baboothmull and Bhoormull, who gave conflicting and incredible explanations as to how they had come by these goods;

(*c*) The source from which and the circumstances in which Bhoormull or Baboothmull acquired these goods, were facts especially within their knowledge and on the principle underlying section 106, Evidence Act, these facts had to be proved by them. They deliberately failed to disclose those facts or to give the cessary particulars of the persons from whom the goods were allegedly purchased, although such information was repeatedly requisitioned from Bhoormull by the Collector, and they were duty-bound under section 171-A to disclose it. This contumacious conduct of Baboothmull and Bhoormull strongly pointed towards the conclusion that the goods were smuggled stocks, and in that sense, the inference arising from the circumstances had shifted the onus on to Bhoormull to prove to the contrary. In this connection, reliance has been placed upon *Issardas Daulat Ram* v. *Union of India*[1]

1. (1962) 2 S.C.J. 286 : (1962) 1 S.C.R. (Supp.) 358 : 1966 Crl. L.J. 1507: A.I.R. 1966 S.C. 1867.

and *M/s. Kanungo & Co.* v. *Collector of Customs, Calcutta*[1].

(*d*) The order of the Collector did not suffer from any apparent error or defect of jurisdiction. His order was based on an appraisement of the circumstantial evidence before him and was consistent with the rules of natural justice. He had given the fullest opportunity to the respondent to put forth his case and had issued two show cause notices to him through his solicitors. The Division Bench of the High Court exercising jurisdiction under Article 226 was not competent to go into the question of the adequacy of that evidence, and act as if it was a Court of appeal.

29. Mr. Ramamurthi, learned Counsel for the Respondent, contends in reply, that all proceedings were conducted by the Collector on the assumption that Bhoormull was the claimant or the supposed owner of the goods; that at no stage, before the High Court an objection was taken that he had no *locus standi* to maintain the writ petition, because he had no interest in the confiscated goods, and consequently this objection should not be entertained for the first time in this Court. Learned Counsel further submits that proceedings of confiscation being penal in nature, the burden was on the Department to show by cogent and convicing evidence that the goods had been illicitly imported into India and that no part of this burden could be shifted to the person claiming the goods. It is emphasised that in the present case, no evidence whatever was produced by the Department to show that the goods in question were smuggled goods. The Collector's order—proceeds the argument—calling upon Bhoormull to prove that he had purchased these goods in the normal course of business was contrary to the law laid down by this Court in *Ambalal* v. *Union of India*[2]. Reference has also been made to several decisions of the High Courts, but most of them turn on their own facts and do not elucidate the principle beyond what was laid down in *Ambalals's case*.[1]

30. It cannot be disputed that in proceedings for imposing penalties under Clause (8) of section 167, to which section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it—"all exactness is a fake". *El Dorado* of absolute proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered—to use the words of Lord Mansfield in *Blatch* v. *Archar*[2], "according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy

1. (1972) Mer.L.R. 17: (1973) 2 S.C.J. 219: (1973) S.C.C. (Cr.) 846: (1973) 2 S.C.C. 438: A.I.R. 1972 S.C. 2136.
2. I.L.R. (1961) 1 Punj. 685 : (1961) 1 S.C.R. 933 : (1963) 1 Crl.L.J. 326: A.I.R. 1961 S.C. 264.

1. I.L.R. (1961) 1 Punj 685: (1961) 1 S.C.R. 933: (1963) 1 Crl. L.J. 326 : A.I.R. 1961 S.C. 264.
2. (1774) 1 Cowp. 63 at 65.

and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence' (12th Edn., Article 320, page 291), the presumption of innocence is, no doubt, *presumptio juris*: but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property." though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice.

33. Another point to be noted is that the incidence, extent and nature of the burden of proof for proceedings for confiscation under the first part of the entry in the 3rd column of Clause (8) of section 167, may not be the same as in proceedings when the imposition of the other kind of penalty under the second part of the entry is contemplated. We have already alluded to this aspect of the matter. It will be sufficient to reiterate that the penalty of confiscation is a penalty *in rem* which is enforced against the goods and the second kind of penalty is one *in personam* which is enforced against the person concerned in the smuggling of the goods. In the case of the former, therefore, it is not necessary for the Customs authorities to prove that any particular person is concerned with their illicit importation or exportation. It is enough if the Department furnishes *prima facie* proof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person proceeded against was *concerned in the smuggling*.

34. The propriety and legality of the Collector's impugned order had to be judged in the light of the above principles.

35. It is not correct to say that this is a case of no evidence. While it is true that no direct evidence of the illicit importation of the goods was adduced by the Department, it had made available to the Collector several circumstances of a determinative character which coupled with the inference arising from the dubious condut of Baboothmull and Bhoormull, could reasonably lead to the conclusion drawn by the Collector, that they were smuggled goods. These circumstances have been set out by us earlier in this judgment. We may recapitulate only the most salient among them.

36. The importation of such goods into India had been banned several years earlier; *i.e.*, some of them in 1957 and of others in 1960. These goods, without exception, were all of foreign origin. They were of large value of over Rs. 12,000. They were all lying packed as if they had been freshly delivered, or were ready for despatch to a further destination. They were not lying exhibited for sale in the show-cases of the shop. Baboothmull from whose apparent custody or physical possession, they were seized disclaimed not only their ownership but also all knowledge about the contents of the packages. He could not give a satisfactory account as to how those packages came into his shop. At first, he said that some next-door unknown broker had left them outside his shop. Some days later, he came out with another version *viz.*, that one Bhoormull had left them there. Eight days after, one mysterious person who gave out his name as Bhoormull laid claim to these goods. Despite repeated requisitions Bhoormull did not furnish any information regarding the source of the alleged acquisition of the goods. He never appeared personally before the Collector. He remained behind the

scenes. He did not give addresses or sufficient particulars of the brokers who had allegedly sold the goods to him on the 3rd June. Whatever cryptic information was given by him, was also conflicting. Despite two show cause notices, Bhoormull intransigently refused to disclose any further information. Apart from making a bare claim, he did not furnish evidence of his ownership or even juridical possession of the goods. The totality of these circumstances reinforced by the inferences arising from the conduct of Baboothmull and Bhoormull could reasonably and judicially lead one to conclude that these goods had been illicitly imported into Madras, a sea port. Even if the Division Bench of the High Court felt that this circumstantial evidence was not adequate enough to establish the smuggled character of the goods, beyond doubt, then also, in our opinion, that was not a good ground to justify interference, with the Collector's order in the exercise of the writ jurisdiction under Article 226 of the Constitution. The function of weighing the evidence or considering its sufficiency was the business of the Collector or the appellate authority which was the final Tribunal of fact. "For weighing evidence and drawing inferences from it", said Birch, J., in *Queen* v. *Madhub Chander*[1], "there can be no canon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited". It follows from this observation that so long as the Collector's appreciation of the circumstantial evidence before him was not illegal, perverse or devoid of common sense, or contrary to rules of natural justice there would be no warrant for disturbing his finding under Article 226. The Collector's order was not of this kind.

37. In the view that the initial onus of proof on the Department can be sufficiently discharged by circumstantial evidence, we are supported by the decision of this Court in *Issardas Daulat Ram's case*[2]. There, on 14th September, 1954, that is long before the insertion of section 178-A in the Act, a quantity of gold was sent to a refinery in Bombay for the purpose of melting. The Customs authorities seized this gold when it was being melted. The gold was found to be of foreign origin and had been imported into India in contravention of the Foreign Exchange Regulation Act, 1947. The Collector of Customs confiscated it under section 167 (8) of the Act. The legality of confiscation was challenged by a petition. under Article 226 of the Constitution before the High Court, on the ground that there was no evidence before the Collector to show that the gold had been imported into India after restrictions had been imposed in March, 1947 on its importation. The High Court rejected this contention and dismissed the petition. The same argument was advanced before this Court in appeal by Special Leave. This Court also negatived this contention. While conceding that there was no direct evidence that the gold had been smuggled after March, 1947, it was held that a finding to that effect could be reached by referring to "the conduct of the appellant in connection with: (*a*) the credibility of the story about the purchase of this gold from threee parties; (*b*) the price at which the gold was stated to have been purchased which was less than the market price; and (*c*) the hurry exhibited in trying to get the gold melted at the refinery with a small bit of silver added so as to reduce the fineness of the gold and thus approximate the resultant product to illicit gold found in the market".

38. The rule in *Issardas Daulat Ram's case*[1] was reiterated with amplification in *M/s. Kanungo & Co.'s case*[2]. Therein, the appellant was a firm carrying on business as dealer, importer and repairer of watches. On a search of the firm's premises on 17th October, 1959, the Customs authorities seized 390 watches out of which 250 were confiscated on the ground that they had been illicitly imported into India. The firm's petition under Article 226 of the Constitution was allowed by a learned single Judge of the High Court and the order of confiscation was quashed on the ground that the customs authorities

1. (1874) 21 W.R. (Cr.) 13 at p. 19.
2. (1962) 1 S.C.R. (Supp.) 358 : (1962) 2 S.C.J. 286 : A.I.R. 1966 S.C. 1867: (1966) Cr. L.J. 1507.

1. (1962) 1 S.C.R. (Supp.) 358 : (1962) 2 S.C.J. 286 : A.I.R. 1966 S.C. 1867 : 1966 Crl.L.J. 1507.
2. (1973) 2 S.C.J. 219 : A.I.R. 1972 S.C. 1236.

had failed to prove illicit importation of the watches. On appeal by the Department, the Division Bench of the High Court reverse the decision of the single Judge with these observations:

"The watches were seized from the possession of the Respondent No. 1 (appellant) who had not obtained a licence or a customs clearance permit for importation of the same. They were of foreign make and must have been imported across the customs frontier. The explanations offered by the Respondent No. 1 regarding its coming into possession of the same between 1956 and 1957 were found, upon enquiries by the customs authorities, to be false, the result of these enquiries were communicated to the Respondent No. 1 who was thereafter heard by the adjudicating officer. Yet no attempt was made by the Respondent No. 1 to substantiate its claim regarding lawful importation of the watches.............. The customs authorities came to the conclusion that the said 280 watches were illegally imported and thereupon made an order for confiscation of the same. It is not for this Court, in exercise of its jurisdiction under Article 226 of the Constitution to revise, set aside or quash this order, in the facts of this case."

39. In appeal on certificate, it was contended before this Court that there was no evidence that these watches had not been illicitly imported into India and that the impugned order wrongfully placed the burden on the appellants. Sikri, C.J., speaking for the Court, repelled this contention thus:

"There is also no force in the second point because we do not read the impugned order as having wrongly placed the burden on the appellant. What the impugned order does is that it refers to the evidence on the record which militates against the version of the appellant and then states that the appellant had not been able to meet the inferences arising therefrom. In our opinion, the High Court was right in holding that the burden of proof had shifted on to the appellant after the Customs Authorities had informed the appellant of the results of the enquiries and investigations.

This also disposes of the first point. As we have said, the burden was on the Customs Authorities which they discharged by falsifying in many particulars the story put forward by the appellant.......... It cannot be disputed that a false denial could be relied on by the Customs Authorities for the purpose of coming to the conclusion that the goods had been illegally imported."

40. In the case before us the circumstantial evidence suggesting the inference that the goods were illicitly imported into India, was similar and reasonably pointed towards the conclusion drawn by the Collector. There was no violation of the rules of natural justice. The Collector had given the fullest opportunity to Bhoormull to establish the alleged acquisition of the goods in the normal course of business. In doing so, he was not throwing the burden of proving what the Department had to establish, on Bhoormull. He was simply giving him a fair opportunity of rebutting the first and the foremost presumption that arose out of the tell-tale circumstances in which the goods were found, regarding their being smuggled goods, by disclosing facts within his special knowledge.

41. *Amba Lal's case*[1], strongly relied upon by Mr. Ramamurthi, is clearly distinguishable on facts. There Amba Lal was originally a resident of Pakistan. He migrated into India on the partition of the Indian sub-continent before March, 1948 when the customs barrier between India and Pakistan was raised for the first time. The Department did not lead any evidence, circumstantial or direct that the goods seized from Amba Lal had been illicitly imported. Amba Lal gave plausible explanation that he had brought those goods along with him in 1947, when there were no restrictions on their importation. The Department however, tried to take advantage of certain alleged discrepancies in the statements of Amba Lal which were recorded in English. Amba Lal did not know English. He was not supplied

1. (1961) 1 S.C.R. 933 : (1961) 1 Crl.L.J. 326; A.I.R. 1961 S.C. 264.

with copies of those statements, nor allowed to inspect them. This Court, therefore, held that the Department was not entitled to rely on those discrepancies.

42. Quoting from *Shambhu Nath Mehra* v. *State of Ajmer*[1], the Court said that section 106, Evidence Act, "cannot be used to undermine the well-established rule of law that, save in a very exceptional class of cases, the burden is on the prosecution and never shifts". It was added:

> "If section 106 of the Evidence Act, is applied, then, by analogy, the fundamental principles of criminal jurisprudence must equally be invoked".

43. If we may say so with great respect, it is not proper to read into the above observations more than what the context and the peculiar facts of that case demanded. While it is true that in criminal trials to which the Evidence Act, in terms applies this section is not intended to relieve the prosecution of the initial burden which lies on it to prove the positive facts of its own case, it can be said by way of generalisation that the effect of the material facts being exclusively or especially within the knowledge of the accused, is that it may, proportionately with the gravity or the relative triviality of the issues at stake, in some special type of cases, lighten the burden of proof resting on the prosecution. For instance, once it is shown that the accused was travelling without a ticket, a *prima facie* case against him is proved. If he once had such a ticket and lost it, it will be for him to prove this fact within his special knowledge. Similarly, if a person is proved to be in recent possession of stolen goods, the prosecution will be deemed to have established the charge that he was either the thief or had received those stolen goods knowing them to be stolen. If his possession was innocent and lacked the requisite incriminating knowledge, then it will be for him to explain or establish those facts within his peculiar knowledge, failing which the prosecution will be entitled to take advantage of the presumption of fact arising against him, in discharging its burden of proof.

44. These fundamental principles shorn of technicalities, as we have discussed earlier, apply only in a broad and pragmatic way to proceedings under section 167 (8) of the Act. The broad effect of the application of the basic principle underlying section 106, Evidence Act to cases under section 167 (8) of the Act, is that the Department would be deemed to have discharged its burden if it adduces only so much evidence, circumstantial or direct, as is sufficient to raise a presumption in its favour with regard to the existence of the facts sought to be proved. *Amba Lals' case*[1], was a case of no evidence. The only circumstantial evidence *viz.*, the conduct of Amba Lal in making conflicting statements, could not be taken into account because he was never given an opportunity to explain the alleged discrepancies. The status of Amba Lal *viz.*, that he was an immigrant from Pakistan and had come to India in 1947—before the customs barrier was raised—bringing along with him the goods in question, had greatly strengthened the initial presumption of innocence in his favour. *Amba Lal's case*[1], thus stands on its own facts.

45. The present case is in line with the decisions in *Issardas Daulat Ram's case*[2], and *M/s. Kanungo & Co.'s case*[3].

46. For all the foregoing reasons, we are of the opinion that the learned Judges of the High Court were in error in reversing the judgment of the learned single Judge and in quashing the order of the Collector of Customs. We, therefore, allow this appeal, set aside the judgment under appeal and dismiss the writ petition. In view of the law point involved, we would leave the parties to bear their own costs.

V.K. ——— *Appeal allowed.*
Writ Petition dismissed.

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1. 1956 S.C.R. 199 : (1956) 2 M.L.J. (S.C.) 1 : 1956 S.C.J. 429 : A.I.R. 1956 S.C. 404 : 1956 Crl.L.J. 794.

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1. (1961) 1 S.C.R. 933 : (1961) 1 Cr.L.J. 326: A.I.R. 1961 S.C. 264.
2. (1962) 1 S.C.R. (Supp.) 358: (1962) 2 S.C.J. 286: 1966 Cr. L.J. 1507: A.I.R. 1966 S.C. 1867.
3. (1973) 2 S.C.J. 219: A.I.R. 1972 S.C. 2136.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT.—*D. G. Palekar and V. R. Krishna Iyer, JJ.*

P. Palaniswami .. *Appellant* *

v.

Shri Ram Popular Service (P.) Ltd. and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 47—Application for stage carriage permits—Disposal of by transport authorities—Government issuing G.O. giving guidance for such disposal—Orders based on such G.O.—Validity.

Once it is found that a Tribunal which under the statute has to deal with applications for permits in a judicial manner is directed by the Government to adopt any specified method for assessing the merits of the applicants and the Tribunal takes into consideration such direction of the executive, the judicial determination by the Tribunal is polluted. It is polluted not merely because these instructions have a tendency to interpret section 47 of the Motor Vehicles Act in their own way but also because considerations other than those in the instructions get automatically excluded although they are quite relevant for the purpose of section 47. The High Court was therefore right in remanding the case to the Tribunal for a re-hearing without the constraint of the Government order.

[*Para.* 7.]

Cases referred to :—

B. Rajagopala Naidu v. *State Transport Appellate Tribunal and others,* (1964) 7 S.C.R. 1 : (1964) 2 S.C.J. 570 : (1964) 2 M.L.J. (S.C.) 131 : (1964) 2 An.W.R. (S.C.) 131: A.I.R. 1964 S.C. 1573 ; *R. Laxmi Narayan* v. *Vythilingam,* C.A. No. 1792 of 1966, decided on 27th August, 1969 ; *R. M. Subhraj* v. *K. M. Union (P.) Ltd. and others,* (1973) 1 S.C.J. 337 : (1973) 1 An.W.R. (S.C.) 56 : (1973) 1 M.L.J. (S.C.) 56 : (1973) 3 S.C.C. 871 : A.I.R. 1972 S.C. 2266.

* C.A. No. 1789 of 1967. *3rd December,* 1973.

The Judgment of the Court was delivered by

Palekar, J.—This is an appeal by certificate from the judgment and order, dated 5th August, 1964 in W.P. No. 4 of 1963 of the High Court of Madras.

2. The facts giving rise to the present appeal are as follows :

The Secretary, Regional Transport Authority, Tirunelveli, invited applications for the grant of a stage carriage permit on the route Tuticorin to Tiruchendur via Mikkani. The distance was about 24 miles. It was a medium route as mentioned in Government Order No. 2265 Home, dated 9th February, 1958. Several persons applied for the grant. The Regional Transport Authority considered the claims in the light of the directions issued by the State Government under section 43-A of the Motor Vehicles Act, 1939, in G.O.Ms. No. 2265, Home, dated 9th August, 1958, and since, in its opinion, the respondents Shri Ram Popular Service (P.) Ltd., had obtained the highest number of marks, namely, 3, the respondents were entitled to the grant. Six others including the present appellant who were aggrieved by that order, went in appeal to the Transport Appellate Tribunal, Madras. By a process of elimination the only important contestors before the Tribunal were the appellant and the respondents. The Tribunal found that so far as the marks were concerned, respondents had scored more marks and would, therefore, be entitled to serious consideration. But in the view of the Tribunal the respondents were a fleet owner with 32 permits while the appel-

lant was a small operator with only two or three permits, and since in all respects the appellant was quite eligible, he was entitled to be preferred to the respondents on the ground that, in the interest of the public, small operators require encouragement as against the bigger operators. For this, the Tribunal relied on a clause of the G.O. referred to above which said that small and medium operators must be preferred to the bigger operators on the smaller and medium routes. The Tribunal, therefore, reversed the order of the Regional Transport Authority and made the grant in favour of the appellant.

3. The respondents, thereupon, filed the writ petition in the High Court for setting aside the order of the Tribunal. The learned Single Judge of the Court, who heard the writ petition, was of the view that there was no error in the order passed by the Tribunal because preference based on classification of operators as fleet owners and medium operators was germane to section 47 of the Motor Vehicles Act, which prescribed the matters which had to be considered by the authority for the purposes of a grant of a stage carriage permit. The writ petition was, therefore, dismissed.

4. The Respondent then filed a letters patent appeal. By this time the decision of this Court in *B. Rajagopala Naidu* v. *State Transport Appellate Tribunal and others*[1] had been rendered and by that decision G.O. No. 1298, dated 28th April, 1956, which was the previous direction issued by the State Government under section 43-A of the Motor Vehicles Act, was set aside. It was held that it was legitimate to assume that the Legislature intended to respect the basic and elementary postulate of the rule of law that in exercising their authority and discharging their quasi-judicial functions, the Tribunals constituted under the Act must be left absolutely free to deal with the matter according to their best judgment guided only by the statutory light. It was pointed out that it was of the essence of fair and objective administration of law that the decision of judges or Tribunals must rest on merits independent of guidance by the executive or administrative wing of the State. It was true that section 43-A empowered the State Government to issue directions to the Regional Transport Authority and the authority was bound under that section to give effect to all such directions. But since the Government order purported to give directions in respect of matters which had been entrusted to the authorities constituted under the Act and which have to be dealt with in quasi-judicial manner the Government order to that extent was outside the purview of section 43-A. The result was that the decisions of the Transport Authorities which were based upon the Government Order and not on an independent assessment of the matters referred to in section 47 of the Motor Vehicles Act were liable to be set aside. This decision was available to the Division Bench of the High Court when the appeal filed by the respondents came for hearing. The Bench took the view that though the Supreme Court had dealt with G.O. No. 1298 of 1956 and in the case before it they were dealing with its substitute, namely, G.O. No. 2265 of 1958, it made no difference in principle because the substitute G.O. also gave directions as to how the applications for stage carriage permits had to be disposed of and if the authorities felt themselves bound by the directions given, then their orders deserved to be set aside for the same reasons which prevailed in the Supreme Court in *B. Rajagopala Naidu's*

1. (1964) 7 S.C.R. 1 : (1964) 2 S.C.J. 570 : (1964) 2 M.L.J. (S.C.) 131 : (1964) 2 An.W.R. (S.C.) 131 : A.I.R. 1964 S.C. 1573.

case.[1] That view of the High Court is unexceptionable because this Court in a later decision in *R. Laxmi Narayan* v. *Vythilingam*[2] held that the Government Order No. 2265 of 1958 was also invalid.

5. Therefore, the only question which remained before the High Court for consideration was whether the Tribunal applied its mind independently to the matters referred to in section 47 of the Motor Vehicles Act or felt itself constrained by the Government Order No. 2265 of 1958 referred to above. After referring to observations made by the Tribunal itself in its order the High Court thought that the Tribunal was obviously fettered by the compulsive force of the Government order in coming to its decision and, therefore, its order was vitiated. Accordingly, the appeal was allowed, the grant was quashed and the matter was sent down for re-hearing by the Tribunal in the light of the observations made in the judgment. It is from this order that the present appeal is filed.

6. It is contended by Mr. Ramamurthy, on behalf of the appellant that though there are certain observations in the judgment of the Tribunal to show that it was following the Government Order, the judgment itself went to show that the Government order was shown scant respect. According to the Government order, he contended the marks obtained by an operator were determinative of the grant. But in the present case although the appellant had received less marks than the respondents, the Tribunal had considered matters which were germane under section 47 and made the grant in favour of the appellant. The Government order, according to him, undoubtedly covered certain areas which are covered by section 47 also and, if the Tribunal referred to such matters it would not be correct to say that the Government order prevailed in the ultimate decision. For example, in the present case the Tribunal took the view that small operators were to be favoured as against fleet owners on shorter routes and this was a consideration very relevant under sub-clause (*a*) of sub-section (1) of section 47 which required the authority to consider the interest of the public generally. The fleet owners were likely to become monopolistic if even shorter routes were given to them and, in course of time, if they monopolised both the shorter routes and the longer routes there would be no effective competition which is, undoubtedly, necessary in the interest of the public generally. The small operators being encouraged to successfully ply the shorter routes would in course of time be ready to take over the longer routes and that would generate healthy competition between the longer route operators and help in promoting passenger interests. In other words, such a consideration was germane to section 47 and merely because the Government order said that they should be preferred, it cannot be construed as having been compulsive in the actual decision taken. There is undoubtedly some force in this approach. Still we think that the High Court was right in coming to the conclusion that the Tribunal appeared to have been influenced by the G.O. and, hence, its decision was liable to be set aside.

7. It must be noted that when the Tribunal decided the case in 1960 the validity of the Government order issued under section 43-A had not come under challenge and grants of permits under section 47 of the Motor Vehicles Act were disposed of on the lines given in those Government orders. The Tribunal in the present case obviously felt bound by Govern-

1. (1964) 7 S.C.R. 1: (1964) 2 S.C.J. 570: (1964) 2 M.L.J. (S.C.) 131: (1964) 2 An.W.R. (S.C.) 131: A.I.R. 1964 S.C. 1573.
2. C.A. No. 1792 of 1966, decided on 27th August, 1969.

ment Order No. 2265 of 1958 because it said in two places as follows :

> "............ but when the Government have laid down their policy, the Regional Transport Authorities and the Tribunal should honestly endeavour to follow it."

> "............ The right of appeal cannot be made illusory, and interests of justice and consistency and the need for honestly applying the Government order compel me to set aside the grant made in favour of the respondent, though otherwise they (respondent) may be deserving of the grant and to grant the permit to the third appellant."

We have gone through the judgment of the Tribunal and it must be said that it has taken into consideration factors which are germane under section 47. The Tribunal noticed that the appellant was entitled to 1/4 mark more than what was given to the appellant by the Regional Transport Authority. But this addition did not make any difference because even with this addition to the appellant's marks the respondents' score would be still higher. It also considered the period of experience of the appellant in the line and noticed that he had two or three permits on shorter routes. Recently he had shifted to Tuticorin which was one of the termini of the route and had also a well-fitted workshop at Tuticorin. Then again for 3 years preceding the date of the application the appellant had got a very clean record. All these were matters which the Tribunal was entitled to take into consideration under section 47 and merely because they also find a place in the Government order it would not be enough to show that the Government order was decisive in the final order passed by the Tribunal. But this ignores a very vital aspect of the case. When there is a Government order in existence and parties applying for permits come to know that the authorities under the Motor Vehicles Act, were disposing of their applications for permits in accordance with the Government order, matters not referred to in the Government order but which may be very germane for consideration under section 47 get automatically excluded during the hearings. The Government order, instead of section 47, becomes the last word on the subject. That is the real vice of such Government instructions. The authorities feel bound by these instructions and the parties before them feel equally bound by them. They, naturally exclude from the controversy other matters which though relevant under section 47 do not find a place in the Government order. As pointed out by this Court in *R. M. Subhrai* v. *K. M. Union (P.) Ltd., and another*[1]. "Once it is found that a Tribunal which under the statute has to deal with applications for permits in a judicial manner is directed by the Government to adopt any specified method for assessing the merits of the applicants and the Tribunal takes into consideration such direction of the executive, the judicial determination by the Tribunal is polluted." It is polluted not merely because those instructions have a tendency to interpret section 47 in their own way but also because considerations other than those in the instructions get automatically excluded although they are quite relevant for the purpose of section 47. We are, therefore, of the opinion that the High Court was right in remanding the case to the Tribunal for a re-hearing without the constraint of the Government order.

8. Mr. Ramamurthy, then contended that in any case the respondent would not be entitled to a grant because by Act

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1. (1973) 1 S.C.J. 337 : (1973) 1 An.W.R. (S.C.) 56 : (1973) 1 M.L.J. (S.C.) 56 : (1973) 3 S.C.C. 871 : A.I.R. 1972 S.C. 2266.

XVI of 1971 the Motor Vehicles Act, 1939 has been amended in its application to the State of Tamil Nadu and under those amendments the respondents who are the owners of 32 permits will not be entitled to consideration for grant of permit. It is, however, contended on behalf of the respondents that it is impossible for their learned Counsel to meet the contention here because several other considerations may arise including the willingness of the respondents to surrender some of their permits in order to come within the permissible limit. We do not think we should deal with the matter here. The Tribunal will now be considering the matter afresh and if it is open to the appellant to put forward this contention, he is welcome to do it before the Tribunal.

9. The appeal is, therefore, dismissed. But this order shall not affect the carrying on of the business by the appellant and the respondents on the basis of permits granted as a result of stay orders till the Tribunal decides about the grant in accordance with law. There shall be no order as to costs.

V.K. ——— *Appeal dismissed.*

[END OF VOLUME (1974) II M.L.J. (S.C.)]